JOSE ANTHONY BORJA
CDCR # T-54311
P.O. BOX 5104
DELANO. CA. 93216
PETITIONER / APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ANTHONY BORJA
PETITIONER / APPELLANT

Vs

MATTHEW CATE: CDCR SECRETARY
M. D. BITER: WARDEN KVSP
RESPONDENT

CASE NO. 12-56187
D-C NO. 2:09-02420 DDP
CENTRAL DISTRICT CALIFORNIA

PETITION FOR "REHEARING" — WITH A REQUEST FOR "EN-BANC" HEARING AND CONSIDERATION

"PETITION FOR EN-BANC REHEARING"

TABLE OF CONTENTS

"INDEX OF EXHIBITS"

JOSE ANTHONY BORJA
CDCR # T-54311
P. O. Box 5401
DELANO, CA. 93216
PETITIONER / APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ANTHONY BORJA
PETITIONER / APPELLANT

Vs

MATTHEW CATE: CDCR - SECRETARY -- AND M.D. BITER - WARDEN - KUSP
RESPONDENT

CASE NO. 12-56187
D.C. NO. 2-09-02420 DDP
Central District California

PETITION FOR REHEARING --- WITH A "REQUEST FOR EN-BANC HEARING AND CONSIDERATIONS

TO: THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEAL, FOR THE NINTH CIRCUIT:

COMES THE PETITIONER / APPELLANT "JOSE ANTHONY BORJA" ACTING AS HIS OWN COUNSEL -- IN PRO-SE !! RESPECTFULLY PETITIONS - THE ABOVE ENTITLED "FULL" COURT FOR A REHEARING ---- WITH A SUGGESTION FOR "EN-BANC" HEARING AND CONSIDERATION !!

--- MADE ON THE GROUNDS THAT PANEL DECISION IS IN CONFLICT WITH EXISTING OPINIONS FROM BOTH THE U. S. SUPREME COURT AND NINTH CIRCUIT --- AND INVOLVE ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE FED. R. APP. P. 35(A) AND (B)(1) AND 9TH CIR. R. 35-1

"Statement of the Case"

PETITIONER FILED HIS FEDERAL HABEAS CORPUS IN THE CENTRAL DISTRICT COURT IN LOS ANGELES CASE NO. 2:09-CV-02420-DDP-S: PRESENTING THE ISSUES OF:

(1) THAT HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL, AND DUE PROCESS AS A RESULT OF THE LAW ENFORCEMENT "GANG EXPERTS" TESTOMONY ON ULTIMATE ISSUE OF FACT AS TO PETITIONER'S "GUILT" BY RENDERING HIS OPINION THAT DEFENDANT COMMITTED THE ISTANT OFFENSES FOR THE PURPOSE OF AND THE BENIFIT OF THE CRIMINAL STREET GANG!!

(2) THAT DUE PROCESS AND FAIR TRIAL REQUIREMENTS WERE VIOLATED --- THERE WAS NOT SUFFICIENT EVIDENCE TO ESTABLISH THAT PETITIONER'S CONDUCT MET THE GANG ENHANCEMENT STATUTE'S ELEMENTS --NOR THAT PETITIONER HAD THE REQUISITE --- "SPECIFIC INTENT" TO SUSTAIN A GANG ENHANCEMENT FINDING --- AND THE GANG OFFENSE WAS AN IN-APPROPRIATE CHARGE, AND WAS FALSELY AND WRONGFULLY USED TO PREJUDICE AND CONTAMINATE THE JURORS --- RENDERING THE TRIAL "FUNDEMENTALLY UN-FAIR" [See C.O.A - pg 4-15: APPENDIX TWO]

(3) THERE WAS INSUFFICIENT EVIDENCE, THAT PETITIONER WAS AWARE OF THE BAUTISTA'S WHEN THE VICTIM CARLOS ANDRADE WAS SHOT!!

THE DISTRICT COURT DENIED ALL THREE OF THESE CLAIMS ON THEIR MERITS --- AND LIKEWISE ALSO DENIED A REQUEST TO ISSUE A CERTIFICATE OF APPEALABILITY

---- Petitioner then filed a timely notice of Appeal, and also filed an in-depth petition to the Ninth Circuit, for the issuance of the certificate of appealability [See attached Appendix two pg 1-15 inclusive]

on 6-19-13 the Ninth Circuit Panel Judges --- issued an order denying the request for the C.O.A. without stating any reasons, for the denial ???! [See attached order as Appendix one]

Petitioner maintains and asserts that his "in-depth petition to the Ninth Circuit for the certificate of appealability" [Appendix two herein] demonstrated beyond the point of over-kill that his constitutional rights had been violated below --- and that he is entitled to proceed and to be afforded the opportunity to have the Federal Court of Appeals adjudicate the merits of his claim's

---

"Standard of Review"

A petition for rehearing must state with particularity each point of law or fact the party believes the court has overlooked or mis-interpreted, and must succinctly argue why the court has erred!!

Rehearing and En-Banc determinations can be ordered, if it appears that the panel decision is in conflict with existing opinions from the Ninth Circuit or the United States Supreme Court --- and that rehearing is necessary to secure & maintain uniformity of the courts decision's -- or when the proceeding's or issue's involve ---

--- ONE OR MORE QUESTIONS OF EXCEPTIONAL IMPORTANCE --- and all of these are appropriate GROUNDS FOR "REHEARING EN-BANC" see FED R. APP. P. 35(A) and (B)(1) AND 9TH CIR. R. 35-1

THE METHOD OF RESOLVING DECISIONAL CONFLICT --- WHEN FACED WITH IRRECONCILABLE CONFLICT IN CONTROLLING AUTHORITY --- THREE JUDGE PANEL "MUST" CALL FOR EN-BANC DECISION, see [U.S. V HARDESTY] (9TH CIR 1992) 977 F 2D 1347;

PETITIONER maintains THAT HIS case FALLS FALLS WITHIN THE AMBIT OF THE CRITERIA FOR BOTH "REHEARING" AND "EN-BANC" HEARING OR DETERMINATION --- AND RESPECTFULLY moves AND REQUESTS ALL 50 JUSTICES of THE FULL COURT TO BE PRESENTED WITH THIS PETITION -- AND THAT ALL RENDER a VOTE !!!

["LEGAL STANDARD FOR ISSUANCE OF C.O.A"]

THE U.S. SUPREME COURT DECISION IN --- [MILLER-EL V COCKRELL] (2003) 537 U.S 322 123 S. Ct. 1029: THE COURT CLARIFIED THE STANDARDS FOR ISSUANCE OF CERTIFICAT OF APPEALABILITY --- " A PRISONER SEEKING C.O.A NEED ONLY TO DEMONSTRATE A SUBSTANTIAL SHOWING OR DENIAL of a CONSTITUTIONAL RIGHT, -- a PETITIONER SATISFIES THIS STANDARD BY DEMONSTRATING THAT JURISTS of REASON COULD DISAGREE WITH THE DISTRICT, COURTS RESOLUTION of THE CONSTITUTIONAL CLAIMS

---- OR THAT JURISTS OF REASON COULD CONCLUDE THE ISSUES PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER ----- [ID. at 123 S. CT AT 1034] -- CITING [SLACK V MCDONALD] (2000) 529 U.S 473, -- 120 S. CT 1595 ---- REDUCED TO ITS ESSENTIALLY --- "THE TEST IS MET WHERE PETITIONER MAKES A SHOWING THAT, THE PETITION SHOULD HAVE BEEN RESOLVED IN A DIFFERENT MANNER --- OR THAT THE ISSUES PRESENTED WERE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER [ID. • MILLER-EL V COCKRELL at pg 1039] CITING [BAREFOOT V ESTELLE] (1983) 463 U.S. 880 ---- "THIS MEANS THAT THE PETITIONER DOES NOT HAVE TO PROVE THAT THE DISTRICT COURT WAS NECESSARILY WRONG ----. JUST THAT ITS RESOLUTION OF THE CONSTITUTIONAL CLAIM IS DEBATABLE

--- "WE DO NOT REQUIRE PETITIONER TO PROVE, BEFORE THE ISSUEANCE OF C.O.A. THAT SOME JURISTS WOULD GRANT THE PETITION FOR HABEAS CORPUS ---- INDEED A CLAIM CAN BE DEBATABLE EVEN THOUGH EVERY JURIST OF REASON MIGHT THAT AFTER C.O.A. HAS BEEN GRANTED AND THE CASE HAS RECIEVED FULL CONSIDERATION --- THAT PETITIONER WILL NOT PREVAIL --- AS WE HAVE STATED IN "SLACK" --- WHERE THE DISTRICT COURT HAS REJECTED THE CONSTITUTIONAL CLAIMS ON THE MERITS ---- THE SHOWING REQUIRED TO SATISFY § 2253(C) IS STRAIT FORWARD; THE PETITIONER MUST DEMONSTRATE THAT REASONABLE JURISTS WOULD FIND THE DISTRICT COURTS ASS-ESSMENT OF THE CONSTITUTIONAL CLAIM DEBATABLE OR WRONG!! ---- APPLYING THE ABOVE STAN-DARD FOR GRANTING "C.O.A" THIS COURT HAS ACKNOWLEGED THAT THE STANDARD IS RELATIVELY LOW [JENNINGS V WOODFORD (9TH CIR 2002) 290 F. 3D 1006 at 1010: -- CITING "SLACK" at 483] ----

--- MOREOVER. Because the C.O.A. Ruleing IS NOT an ADJUDICATION of the MERITS of the APPEAL --- IT DOES NOT REQUIRE A SHOWING THAT THE APPEAL WILL SUCCEED [MILLER-EL V COCKRELL] SUPRA 537 U.S. at 337 ---

---- FINALLY "DOUBTS" ABOUT THE PROPRIETY OF A CERTIFICATE OF APPEALABILITY "MUST" BE RESOLVED IN PETITIONERS FAVOR (see [LAMBRIGHT V STEWART] (9TH CIR 2000) 220 F. 3D. 1020 at 1025 ("EN-BANC"))

---- PETITIONER HEREIN POINTS OUT THAT - HE NOT ONLY SATISFIED THE LEGAL STANDARDS FOR "THE ISSUANCE OF THE "CERTIFICATE OF APPEALABILITY" E.G.) THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED - PERHAPS BEYOND THE POINT OF OVER-KILL [see APPENDIX TWO] --- BUT MOREOVER PETITIONER HAD ALSO DEMONSTRATED THAT HIS CLAIMS DO IN FACT AND LAW HAVE MERIT AND THAT HE SHOULD BE GRANTED THE RELIEF SOUGHT!!!

--- FURTHERMORE IT SHOULD BE ABUNDANTLY CLEAR THAT THE DISTRICT COURTS RULEING AND THE PANEL JUSTICES DECISION --- BOTH ARE DIAMETRICALLY OPPOSSED TOO AND IN DIRECT CONFLICT WITH THE ABOVE CONTROLLING AUTHORITY AND PRECEDENCE FROM THE UNITED STATES SUPREME COURT AND THE U.S. COURTS OF APPEALS ON THE SAME EXACT ISSUES AND FACTS !!

"Merits of the Constitutional Claims" "

[Denial of Jury Trial and Due Process]

This constitutional violation is strait forward and literally "cut and dry" --- it is a universally accepted legal principal that an expert witness cannot testify or give their opinion on guilt or innocence of the defendant -- or as to any ultimate issues of fact in dispute ---

--- Here in this instant case, the prosecution's gang expert -- officer Skahil gave direct testomony that his opinion was that petitioner was guilty --- for example! The gang expert "Skahil" testified that petitioner "Borja" had committed the underlying offense's for the benifit of the criminal street gang (see [3 RT. pg 223-224 and 229-233] and [3 RT. 291-312-313] see also petitioner's federal habeas corpus points and authorities pg 8-11 on file with this court!!

Whatsmore is that the ninth circuit has already ruled on and clarified this issue (see [Briceno v Scribner] (9th cir 2009) 555 f. 3d 1089. (footnote #1) --- stateing that if an expert expressed his judgement that the crimes were committed for the benifit of the gang, that this would be "improper" and amount to an expert opinion that defendant was guilty ("emphasis added") citing (Moses v Payne) 543 f 3d 1090 at 1106 and (U.S. v Lockett) 919 f. 2d 585 at 590

The gang expert "Skahil" also testified that in his opinion the present shooting was committed to promote, assist or further the "Hubley" street gang [3 RT 233-234] and [2 RT 62] and [3 RT. 291-312-313]

--- FURTHERMORE, as the COURT stated IN case of [BRICENO V SCRIBNER] SUPRA 555 F 3D at 1082 --AN EXPERTS WITNESS TESTOMONY IS Limited TO MATTERS ABOUT GANG CULTURE AND HABITS BUT SUCH TESTOMONY IS INSUFFICIENT TO ESTABLISH THAT a "SPECIFIC INDIVIDUAL POSSESSED a "SPECIFIC intent" that IS MANDATORY PREREQUISITE to SUSTAINING A FINDING ON GANG offense's -- --See also [GARCIA V CAREY] (9TH CIR 2005) 395 F 3D 1099 AT 1101-1103-AND N. #5; -----

---- A GANG EXPERTS SELF SERVEING, SUBJECTIVE SPECULATION AND OPINIONS --- DID NOTHING MORE THAN "IMPROPERLY" INFORM THE JURY HOW [THE EXPERT] BELIEVED THE CASE SHOULD BE DECIDED --- WITHOUT any UNDERLYING factual BASIS to SUPPORT IT [BRICENO V SCRIBNER] SUPRA 555 F 3D AT 1082 [see APPENDIX TWO, PG. 6 and 12-13]

--- to allow SUCH EVIDENCE DEPRIVED A DEFENDANT of DUE PROCESS OF LAW AND HIS RIGHT to a JURY TRIAL UNDER THE SIXTH and FOURTEENTH AMENDMENTS to THE UNITED states CONSTITUTION --- see GENERALLY case of [SULLIVAN V LOUISIANA] (1993) 508 U.S. 275;

--- FURTHERMORE --- SUCH ERRORS IMPLICATE DUE PROCESS RIGHTS aswell as SIXTH amendment PRINCIPALS PRE-SERVEING THE EXCLUSIVE DOMAIN OF THE TRIER OF [redacted] - FACT [CARRELLA V CALIFORNIA] (1989) 491 U.S 263 at 265!

--- "FUNDAMENTALLY UNFAIR" -- [redacted] ERRORS DURRING TRIAL VIOLATES FOURTEENTH amendment (see [RIGGIN'S V NEVADA] (1992) 504 U.S. 127:

--- THE JUDICIAL OBLIGATION TO POLICE STATE CRIMINAL PROCEEDURE'S TO ENSURE THAT THEY ARE CONSISTANT WITH OUR MOST BASIC NOTION'S OF DECENCY AND FAIRNESS HAS SURVIVED THE SELECTIVE INCORPORATION REVOLUTION AND EXISTS INDEPENDENT OF ANY SPECIFIC---

---PROVISION of the BILL OF RIGHTS (See case of CHAMBERS V MISSISSIPPI (1973) 410 U.S. 284 at 294-295:

The UNITED States SUPREME COURT HAS ALSO HELD that IT IS a VIOLATION OF Due Process of Law WHERE State PROSECUTORS fail to Demonstrate OR PROVE EACH and EVERY Element of the CHARGED offense's Beyond a Reasonable Doubt (see case JACKSON V VIRGINIA (1979) 443 U.S. 307 at P. 324! --- and THE NINTH CIRCUIT HAS SPECIFICALLY EXTENDED AND APPLIED THESE PRINCIPALS to CALIFORNIA'S GANG ENHANCEMENT Statute's in BRIGENO V SCRIBNER (9TH CIR 2009) 555 F 3D 1069: AND GARCIA V CAREY (9TH CIR 2005) 395 F. 3D 1099:

AMONG other Elements the state PROSECUTOR must ESTABLISH and PROVE, that a Defendant Committed the UNDERLYING FELONY with the "specific intent to PROMOTE, --- FURTHER OR ASSIST the CRIMINAL Street GANG --- and THIS IS NOT Satisfied BY MERE MEMBERSHIP IN a CRIMINAL street GANG (see GARCIA V CAREY) supra at PG 1102-1103 and N.#5 --- FURTHERMORE the CRIMES MAY NOT Be found TO Be GANG Related --- "Based solely upon Perpetrators CRIMINAL HISTORY and GANG AFFILIATION" (see BRIGENO V SCRIBNER) supra at PG 1078 and Foot note # 6 at P. 1089: WHATSMORE IS that "BRIGENO" COURT specifically noted that UNDER CALIFORNIA LAW GANG EXPERT "CANNOT" EVEN testify as TO a Defendant's "specific intent" IN committing a CRIME [BRIGENO V SCRIBNER, 9TH CIR 2009 555 F. 3D 1069 at 1089. FN #2 !!

IN "BRIGENO" and "GARCIA" case's THE CRIMES were committed IN CONCERT WITH OTHER GANG MEMBERS---

--- IN RIVAL GANG'S TERRATORY -- GANG SLURS AND GANG SIGNS WERE EXCHANGED aswell as other SIGNIFICANT INDICATIONS OF GANG Related Activity AND THOSE COURTS STILL FOUND INSUFFICIENT PROOF for all Elements of said Gang offense's !!!

--- Here in Petitioner's case THE EVIDENCE and THE RECORD IS totally DEVOID of ANYTHING Like what was present in BRIGENO and GARCIA NO GANG SIGNS -- SLURS OR WORDS NOTHING WHAT-SOEVER to EVEN HINT OR INDICATE THAT said CRIME'S were actually BEING committed for ANY CRIMINAL STREET GANG ?! -- other THAN EXPERTS SUBJECTIVE, SPECULATION --- and that Petitioner USED TO BE AFFILIATED with the HUELEY STREET Gang IN THE PAST -- BUT WAS NO LONGER A member NOR currently associate with said Gang

--- SIGNIFICANT ENOUGH TO Point out Here IS that Petitioner's FIRST TRIAL Resulted IN a HUNG JURY, DEADLOCKED at 7-5 for ACQUITTAL, JURIOR'S COULD NOT EVEN AGREE IF Petitioner WAS THE PERPETRATOR ??!! (EMPHASIS)

IT IS TRULY HARD TO "IMAGINE" HOW THE DISTRICT COURT AND PANEL JUSTICES COULD CONCLUDE THAT THE ABOVE CONSTITUTIONAL CLAIM'S -- DID NOT AMOUNT TO A "SUBSTANTIAL SHOWING" THAT HIS CONSTITUTIONAL RIGHTS HAD BEEN VIOLATED --- --- WHEN IT SHOULD BE ABUNDANTLY CLEAR THAT THE ERROR'S WERE SO SUBSTANTIAL THAT THEY DID IN FACT AND LAW, WARRANT REVERSAL AND REMAND !!?

IMPROPER USE OF GANG OFFENSE DENIED PETITIONER A FAIR TRIAL -- DUE PROCESS OF LAW AND DID RENDER HIS JURY TRIAL FUNDE--MENTALLY UNFAIR

NOT ONLY DOES PETITIONER'S CONDUCT "fail" to meet AND FALL WITHIN THE ELEMENTS OF THE GANG offense --- BUT WHAT'S MORE IS THAT IT REALLY DOES NOT AND CANNOT HAVE ANY LEGITIMATE PURPOSE OR FUNCTION AT HIS TRIAL -- AND WAS IMPROPERLY UTILIZED BY PROSECUTION TO EMOTIONALLY CHARGE AND CONTAMINATE & PREJUDICE HIS JURY AND THE TRIAL PROCESS (see Generally Calif Penal Code § 1170.1(f) & [People v RODRIGUEZ] (2009) 47 Cal 4th 501, HOLDING that state cannot use BOTH firearm offense and Gang offense IN THE same PROCEEDING'S {see also APPENDIX TWO Pg 4-7}

---furthermore, Gang offense was WRONGFULLY USED TO BOLSTER OR PROVE ELEMENT OF "IDENTITY" IN an attempt TO PREY ON JUROR'S EMOTION'S AND SWAY THEM INTO BELIEVING OR ASSUMING THAT THE UNDERLYING CRIME'S WERE committed FOR a CRIMINAL STREET GANG --AND THUS PETITIONER MUST BE GUILTY WITHOUT REQUIRING THE state TO actually PRESENT CREDIBLE OR RELIABLE SOLID EVIDENCE OF SUCH!!

AND IMPROPERLY MANIPULATED THE JURORS TO FEEL THAT PETITIONER WAS THE PERPETRATOR WITH-OUT ANY DIRECT EVIDENCE THAT HE WAS IN FACT THAT PERSON --- IN FACT! EYE WITNESS IDENTIFICATION at TRIAL DID NOT EXIST, - THE VICTIM AND OTHER WITNESS testified THAT PETITIONER WAS NOT THE PERSON WHO FIRED THE SHOTS AND WAS NOT THE PERPETRATOR [2 RT: 68-69, 74, 104] [2 RT: 142, 149, 152, 161, 163, 164]

--- Petitioner further demonstrated that the improper procedure's used at his trial violated "Due Process" cause they relieved, lightened or reduced the states obligation to prove each and every element(s) of the charged offenses beyond a reasonable doubt (see in re: winship (1970) 397 U.S. 358 at 364 (and also sandstrom v montanna (1979) 442 U.S 510 (see appendix two pg 7)

Next Petitioner also asserted and demonstrated that these improper procedure's and tactic's by state, violated his constitutional right and guarentee to "presumption of innocence" citing and relying on [norris v risley] (9th cir 1990) 918 f. 2d 828, --- held presumption of innocence was impaired where numerous women wearing "women against rape" button's, attending trial of a defendant charged with sexual assault; or the case of [U.S. v olvera] (9th cir 1994) 30 f 3d 1195 at 1197, --- compelling Defendant to utter word's -- wear clothes or otherwise simulate the crime did violate "right of "presumption of innocence" --- both "norris" and "olvera" courts, noteing that "presumption of innocence" although not specifically articulated in the constition -- is a basic compenant of a fair trial under our system of criminal justice (citing) [estelle v williams (1976) 425 U.S 501, 503 also [appendix two, pg 8]

Next Petitioner also alleged and asserted -- the improper use of the gang evidence and gang charge, rendered his jury trial "fundementally unfair" --- that this was nothing more than emotionally charged "scare tactics" all designed to manipulate and sway juror's mind's --- that it was "propensity" evidence ---

--- THAT UNDERMINED THE JURORS RESPONSIBILITY to Determine the EXISTANCE of the Elements Based upon SOLID, RELIABLE, CREDIBLE EVIDENCE -- and PREY'D upon JURORS EMOTION'S and Lead them to Believe that PETITIONER WAS the type of PERSON who would Commit SUCH type of Violent CRIME'S -- Petitioner cited and Relied upon [McKinny V Rees] (9th Cir 1993) 993 F. 2D. 1378 -- where prosecution convicted that Defendant Basically on the Basis of his character and previous acts as Lifestyle -- the Ninth Circuit Held that this Rendered his trial "fundamentally unfair" and had SUBSTANTIAL INJURIOUS affect or influence in Determining the JURY'S VERDICT citing U.S. SUPREME COURT ["BRECHT V ABRAHAMSON"] 507 U.S. 619; (Reversed and Remanded) [See McKinny V Rees] SUPRA at Pg 1385-1386 and [appendix two Pg 9-10-11]

--- Petitioner's case SHARE'S these same factor'S AS the "McKinny" case ABOVE and SHOULD Be AFFORDED THE same RELIEF !!!

["Cummulative Affect"]

Petitioner asserted and Claimed THAT --- Cummulative EFFECT of these ERROR'S, RESULTED IN a TRIAL that WAS SO INFECTED with UNFAIRNESS AS to MAKE the RESULTING CONVICTION'S A DENIAL of DUE PROCESS [DONNELLY V DE CHRISTOFORO] (1974) 416 U.S. 637 at 643: --- IN ANALYZEING PREJUDICE IN a case WHICH IT IS QUESTIONABLE WHETHER any SINGLE TRIAL ERROR EXAMINED IN ISOLATION IS SOFFICIENTLY PREJUDICIAL to WARRANT REVERSAL -- THE COURTS HAVE RECOGNIZED THE IMPORTANCE of CONSIDERING the Cummulative Effect of---

--- of MULTIPLE ERRORS --- AND NOT TO SIMPLY CONDUCT AN ISSUE BY ISSUE ERROR REVIEW. See U. S. V FREDERICK (9TH CIR 1996) 78 F 3D 1370, 1381 WHELCHEL V WASHINGTON (9TH CIR 2000) 232 F 3D 1197 at 1212: and MATLOCK V ROSE (6TH CIR 1984) 731 F 2D. 1236 at 1244: and APPENDIX TWO PG 14

--- HERE THE DISTRICT COURT DID NOT EVEN CONSIDER OR ASSESS THIS CASE FOR THE --- "CUMMULATIVE IMPACT" of THESE ERRORS, --- THUS, -- AS a BARE MINIMUM THIS INSTANT COURT of APPEALS SHOULD REMAND THE CASE FOR THIS PURPOSE --AND POSSIBLY EVEN AN EVIDENTIARY HEARING AS WELL

- "REMAND FOR EVIDENTIARY HEARING IS NECESSARY" -

ON GROUND ONE HEREIN --- "THAT PETITIONERS SIXTH AMENDMENT RIGHTS WERE VIOLATED BY GANG EXPERTS OPINION TESTOMONY THAT PETITIONER WAS GUILTY" --- THE STATE APPELLATE COURT ON DIRECT APPEAL REFUSED TO ADDRESS THIS FEDERAL CONSTITUTIONAL CLAIM AND THE CALIF. SUPREME COURT MERELY, SUMMARILY DENIED THE ENTIRE PETITION FOR REVIEW --- SO THE UNDERLYING RELEVANT FACTS ON THIS CLAIM WERE "NEVER FULLY DEVELOPED" AND AS SUCH THE LOWER DISTRICT COURT WAS REQUIRED TO ORDER AN EVIDENTIARY HEARING! ---> THE MAGISTRATES REPORT AND RECOMENDATION ON PG: 12, THE COURT NOTES THAT STATE COURT REFUSED TO ADDRESS THIS FEDERAL CLAIM BECAUSE IT WAS NOT RAISED BY THE DEFENDANT AT TRIAL --- AND THE MAGISTRATE CONCLUDED THAT IT CAN DENY THIS CONSTITUTIONAL CLAIM ---

---- WITHOUT REACHING PROCEEDURAL DEFAULT ISSUE --- WHERE THE OUTCOME WOULD BE THE SAME!! --SO FOR REASON'S OF MERE JUDICIAL ECONOMY AND EFFICIENCY -- THIS CLAIM WAS ARBITRARILY DENIED WITHOUT EVEN GIVEING IT DUE CONSIDERATION see [MAGISTRATES R+R attached as APPENDIX THREE] ---- FURTHERMORE IN MAGISTRATES REPORT & RECOMENDATION ON PG: 11-12; foot note NO. 3; --- THE MAGISTRATE JUDGE CONCLUDED THAT AN EVIDENTIARY HEARING WAS NOT REQUIRED Because Petitioner's case DOES NOT satisfy the statute [28 U.S.C.A- section 2254 (e)(2)] Petitioner claim's THAT THIS WAS AN ERROR AND AN INCORRECT statement OF THE LAW, AND ALSO A "MIS/INTERPRETATION" OF THE case FACTS AND THE CONTROLLING HIGHER COURT AUTHORITY ON THE ISSUE --for EXAMPLE! -- ORDINARILY UNDER [28 U.S.C. § 2254-(e)(2)] --IF THE PETITIONER HAS FAILED TO DEVELOPE THE FACTUAL BASIS OF A CLAIM IN state COURT PROCEEDINGS AN EVIDENTIARY HEARING will NORMALLY not BE ALLOWED HOWEVER. IN [WILLIAM'S V TAYLOR (2000) 529 U.S. 420, 437,--- THE SUPREME COURT HELD THAT -- IF THERE HAS BEEN NO LACK OF DILIGENCE AT RELEVANT STAGE'S IN THE state PROCEEDING --- THE PRISONER HAS NOT FAILED to DEVELOPE THE facts UNDER 28 U.S.C. § 2254(e)(2) AND HE will BE "EXCUSED" from SHOWING COMPLIANCE WITH THAT SUBSECTION'S REQUIREMENTS --- AND AN EVIDENTIARY HEARING CAN BE ORDERED !!! see ALSO [DRAKE V PORTUONDO (2ND CIR 2003) 321 F.3D 338, 347 -"EVIDENTIARY HEARING NOT BARRED Because PETITIONER DILIGENTLY SOUGHT to DEVELOPE FACTUAL BASIS UNDERLYING HIS CLAIM'S, BUT WAS PREVENTED FROM DOING SO BY state COURT---" (ALSO see [SAWYER V HOFBAUER (6TH CIR 2002) 299 F.3D 605 at 610 --- AND [BRYAN V MULLIN (10TH CIR 2003) 335 F.3D 1207, at 1215;

---FURTHERMORE, A PETITIONER'S OWN FEDERAL HABEAS CORPUS IS ENTITLED TO AN EVIDENTIARY HEARING-- --WHERE PETITIONER ESTABLISHES merely a COLORABLE Claim FOR RELIEF. AND WHERE PETITIONER HAS NEVER BEEN ACCORDED AN EVIDENTIARY HEARING IN STATE COURT [CARP V ORNOSKI (9TH CIR 2005) 431 F.3D. 1158, 1167: AND [TOTTEN V MERKLE] (9TH CIR 1998) 137 F.3D 1172 at 1176:

FURTHER EXEMPLARY OF THE NEED FOR AN EVIDENTIARY HEARING WAS THE FACT THAT DISTRICT Claimed THAT [PEOPLE V [redacted] ALBILLAR] (2010) 51 CAL 4TH 47, 66,- AND [EMERY V CLARK] (9TH CIR 2011) 643 F.3D. 1210, 1215 these case's OVERRULED (BRICENO V SCRIBNER) SUPRA 555 F.3D 1069 AND GARCIA V [redacted] CAREY SUPRA 395 F.3D 1099: [see MAG. R+R APPENDIX THREE PG 23. FN # 5]

IT IS QUESTIONABLE WHETHER SUCH a RETROACTIVE JUDICIAL CONSTRUCTION IS LEGALLY PERMITTED see case [DOYLE V COLUMBIA] (Citation ommitted)

PETITIONER SHOULD BE ENTITLE TO STATE OF THE LAW AT THE TIME OF THE COMMISSION OF SAID OFFENSE'S

MOREOVER, PETITIONER'S POSITION IS THAT DISTRICT COURT WAS WRONG AND THAT "BRICENO" AND "GARCIA" ARE STILL CONTROLLING AUTHORITY ON THE ISSUES, AND THAT ANY OTHER CONTRARY OR CONFLICTING STATUTORY CONSTRUCTION ARE UNCONSTITUTIONAL AND VIOLATE THE CANNONS OF STATUTORY CONSTRUCTION

THE TRUE FACTS HAVE NEVER BEEN FULLY DEVELOPED OR AIRED AND THE STATES GANG EXPERT MERELY INFORMED JURY HOW HE WANTED CASE TO BE DECIDED BY TELLING JURORS HIS OPINION AND JUDGEMENT THAT PETITIONER WAS GUILTY AND COMMITTED THE UNDERLYING OFFENSE'S FOR BENEFIT OF CRIMINAL STREET GANG -- THE STATE PROSECUTOR AND GANG EXPERT TURNED CASE INTO A GANG RELATED INCIDENT ON THEIR OWN SELF-SERVING VOLITION TO BOLSTER THEIR CASE AGAINST PETITIONER WHEN THEY WERE EXPERIENCING SERIOUS PROOF PROBLEM'S

---- It is difficult to fathom, how it could be gang related when petitioner was not and had not had any association. -- affiliation communication or interaction with anyone from said gang for a long, long time and had not been a gang member any longer --- if the petitioner was even the perpetrator in the first place ??? That if anything, the case is more closely associated with a personal dispute and not gang related activity --- the conduct and true facts just simply, do not fall within the ambit of the elements of the statute !!

An evidentiary hearing is necessary to fully develope the true facts -- then to be measured against which ever of the different statutory constructions of the statute are actually legally applicible to this case ?? ! and in light of the controlling U.S supreme court and federal appellate court decision's and constitutional claim's cited herein

"important question's of exceptional importance"

These substantial constitutional rights and the violation's thereof as asserted herein - are by their very nature "important question's" and have not been ruled on by this court, in the context assert herein --- thus, the full court should re-visit these constitutional. Guarentee's + rights as they relate to, and pertain to the circumstances herein advanced --- furthermore, --- these compartmentalized constitutional violation's alleged & asserted herein --- is the manifestation of the fact that California state prosecutorial authorities have been just running amok and improperly & unfairly useing gang enhancement statute as a catch all and a mean's to convict people of crimes when ---

--- THEY CANNOT ACTUALLY PROVE THEM WITH VALID, SOLID, RELIABLE AND CREDIBLE EVIDENCE AND AMOUNTS TO DISCRIMINATION. BECAUSE THE STATE DISPROPORTIONATELY TARGETS HISPANIC INDIVIDUALS -- AND THIS COURT SHOULD GRANT AN EN-BANC HEARING HEARING TO ADDRESS THIS --- AND REIN IN THE ABUSE OF AUTHORITY AND POWER BEING ENGAGED IN BY CALIFORNIA LAW ENFORCEMENT AND THEIR PROSECUTORIAL AUTHORITIES

--- ADDITIONALLY MATTERS OF STATUTORY CONSTRUCTION ARE INHERENTLY ISSUES OF "EXCEPTIONAL IMPORTANCE" AND ESPECIALLY HERE, WHERE THERE ARE CONFLICTING JUDICIAL CONSTRUCTIONS OF THE SAME STATUTE AND THAT VIOLATE THE CANNONS OF STATUTORY CONSTRUCTION AND MAY BE WHOLLY OR IN PART UNCONSTITUTIONAL --- THUS all THE ELEMENTS FOR EN-BANC REHEARING ARE PRESENT AND COURT SHOULD ORDER A REHEARING, AND A VOTE from ALL MEMBERS OF THE "FULL COURT"

"CONCLUSION"

PETITIONER ASSERTS, THAT HE HAS ESTABLISHED AND DEMONSTRATED THAT THE PANEL JUSTICES "OVERLOOKED" DISPOSITIVE PORTIONS OF --- AND "MISINTERPRETED" THE CONTROLLING DECISIONS from BOTH UNITED STATES SUPREME COURTS AND FEDERAL COURTS OF APPEALS DECISIONS --- AND THAT PANEL DECISION DENYING "C. O. A." WAS IN ERROR ---- AND PETITIONER HAS DEMONSTRATED HIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE --- AND AS A BARE MINIMUM THIS COURT SHOULD CLARIFY THE CONFLICT BETWEEN THE DIFFERENT STATUTORY CONSTRUCTIONS OF THE SAME STATUTE --aswell AS THE CONFLICTING OPINIONS SET FORTH HEREIN --- MOREOVER, PETITIONER'S CASE HAS SATISFIED ALL THE NECESSARY PRONGS TO JUSTIFY THE EN-BANC REHEARING --- THUS PETITIONER IS ENTITLED TO A REHEARING AND AN EN-BANC "VOTE" from all MEMBERS OF THE FULL COURT ----

---AND IN TURN TO HAVE THE "Certificate of Appealability" [C.O.A] ISSUED AND TO PROVIDE PETITIONER WITH A BRIEFING SCHEDULE FOR THE NINTH CIRCUIT COURT OF APPEALS TO ADJUDICATE THE MERITS OF THESE HEREIN SUBSTANTIAL CONSTITUTIONAL CLAIMS

WHEREFORE, IT IS PRAYED AND RESPECTFULLY REQUESTED THAT THIS COURT ORDER THE FOLLOWING RELIEF:

(1) ORDER A REHEARING!

(2) ORDER A FULL "EN-BANC" VOTE FROM ALL MEMBERS AND JUSTICES OF THE ENTIRE COURT!!

(3) ORDER A "certificate of Appealability" BE ISSUED!!! ---AND ...

(4) ... ORDER A BRIEFING SCHEDULE FOR THE COURT TO HEAR AND ADJUDICATE THE MERITS OF THE CONSTITUTIONAL CLAIMS AND VIOLATIONS!!!

{See next Pg: 20, for verification}→

STATE OF CALIFORNIA COUNTY OF KERN

VERIFICATION

C.C.P. SEC. 466 & 2015.5; 28 U.S.C. SEC. 17460

I JOSE ANTHONY BORJA declare under penalty of perjury that: I am the PETITIONER / APPELLANT in the above entitled action. I have read the foregoing documents and know the contents thereof and the same is true of my own knowledge, except as to matters stated therein upon information, and belief, and as to those matters, I believe they are true.

Executed this 24 day of JULY, 2013, Kern Valley State Prison.

Signature X
DECLARANT/PRISONER

PROOF OF SEVICE BY MAIL

C.C.P. SEC. 1013(a) & 2015.5: 28 U.S.C. SEC. 1746

I JOSE ANTHONY BORJA, am a resident of California State Prison, in the County of KERN, State of California: I am over the age of eighteen (18) years and am/am not a party of the above entitled action. My state prison address is: P.O. Box 5104, Delano, CA. 93216.

On July 24, 2013, I served the foregoing PETITION FOR REHEARING AND REQUEST FOR "EN-BANC" CONSIDERATION'S, pg 1-19, complete with APPENDIX'S ONE -- TWO. THREE & LETTER FOR COURT(CLERKS) & JUSTICES OF THE 9TH CIRCUIT
Set forth exact title of document(s) served

On the party(s) herein by placing a true copy(s) thereof, enclosed in sealed envelope(s) with postage thereof fully paid, in the United States Mail, in a deposit box so provided at KERN Valley State Prison, Delano, CA. 93215.

(1) ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA
300, SOUTH SPRING ST. #1702, LOS ANGELES, CALIF 90013
(2) U.S. DIST COURT CENTRAL DISTRICT OF CALIF LOSANGELES
312. N. SPRING ST #G-8, LOS ANGELES CA. 90012-4793
List parties served

There is delivery service by United States Mail at the place so addressed, and/or there is regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: X 7/24/13

X
DECLARANT/PRISONER

APPENDIX ONE

THE NINTH CIRCUIT PANEL DECISION - DENYING THE CERTIFICATE OF APPEALABILITY DATED: 6-19-13

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE ANTHONY BORJA,

Petitioner - Appellant,

v.

MATTHEW L. CATE,

Respondent - Appellee.

No. 12-56187

D.C. No. 2:09-cv-02420-DDP-S
Central District of California,
Los Angeles

ORDER

Before: PAEZ and MURGUIA, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All pending motions, if any, are denied as moot.

"APPENDIX TWO"

THE PETITION TO THE NINTH CIRCUIT FOR THE ISSUANCE OF THE CERTIFICATE OF APPEALABILITY

JOSE ANTHONY BORJA
CDCR # T-54311
P.O. BOX 5104
DELANO. CA. 93216
IN PRO-SE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ANTHONY BORJA PETITIONER; VS. MATTHEW CATE; CDCR SECRETARY RESPONDENT	CASE NO.- 12-56187 DIST COURT CASE NO. 09-2420 "PETITION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY"

TO: THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS,- FOR THE NINTH CIRCUIT

COMES THE PETITIONER "JOSE ANTHONY BORJA" ACTING AS HIS OWN COUNSEL - IN PRO-SE,- RESPECTFULLY MOVES THE HONORABLE JUSTICES OF THE NINTH CIRCUIT FEDERAL COURT OF APPEALS FOR AN ORDER, ISSUING THE "CERTIFICATE OF APPEALABILITY"

THIS MOTION IS BASED ON THE GROUNDS THAT THERE EXIST SUBSTANTIAL EVIDENCE THAT PETITIONER'S CONSTITIONAL RIGHTS HAVE BEEN VIOLATED

PETITIONER SETS FORTH THE FOLLOWING FACTS AND LAW IN SUPPORT OF HIS REQUEST FOR THE ISSUANCE OF THE "CERTIFICATE OF APPEALABILITY"

1.) Petitioner filed a Petition for writ of Habeas corpus in the federal district court - 28 U.S.C. § 2254 from California state court conviction. -- Claiming that his constitutional rights were violated and that the state courts adjudications were, contrary to or involved an unreasonable application of clearly established federal law -- as determined by the Supreme Court of the united states --- and ---- Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding

2.) on sept 1- 2011, Magistrate Judge issued a report and recomendation that Petitioners Habeas corpus be Denied and Dismissed -- the district court judge adopted magistrates recomendations, and Denied and dismissed the Habeas corus --- next Petitioner filed an initial Request for certificate of appealability on 11-29-2011: -- subsequatly on June 5th-2012 the district court judge, issued an order Denying the certificate of appealability --- next the Petitioner filed a timely notice of appeal on June 20th 2012

Petitioner points out that the entire Record from the district court - which includes state lodged documents aswell !!--- are on file with the ninth circuit case no. 12-56187 ;- Docket item #2.

Petitioner Respectfully Requests that this instant court take judicial notice of the entire case file from the district court -- and to treat those documents ,- Records and Pleadings as if though they were fully and fairly set forth in this instant motion for issuance of appealibility

3.) ORDINARILY, -- TO APPEAL THE DENIAL OF A FEDERAL HABEAS CORPUS PETITION, AEDPA REQUIRES A PETITIONER "TO OBTAIN A "Certificate of Appealability" (COA) 28 U.S.C. §2253(C)(2) See also RULE #22(B) OF F.R.A.P.

THIS REQUIREMENT ALSO APPLIES TO APPEALS FROM DISTRICT COURTS DISMISSAL OF A HABEAS CORPUS PETITION, --- SECTION 2253(C)(2) AS AMENDED BY THE AEDPA, PROVIDES THAT A CERTIFICATE OF APPEALABILITY MAY ISSUE, --- IF THE APPLICANT HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A "CONSTITUTIONAL RIGHT" [Slack v McDaniel] (2000) 529 U.S. 473: --- TO OBTAIN A [COA] UNDER §2253(C) A HABEAS PETITIONER MUST MAKE A SUBSTANTIAL SHOWING THAT REASONABLE JURISTS COULD DEBATE OR DISAGREE WITH THE DISTRICT COURTS DECISION ON THE PETITIONS CLAIM'S --- OR THAT THE ISSUES PRESENTED WERE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER (See [Barefoot v Estelle] (1983) 463 U.S. 880, -- [120 L. ed 2d ~~892~~ at Pg 554 "Slack" supra (Above)]

4.) PETITIONER MAINTAINS THAT THE DISTRICT COURTS DENIAL AND DISMISSAL OF HABEAS CORPUS, WAS WRONGFULLY DECIDED AND ERRONEOUS AS A MATTER OF LAW -- AND IN KEEPING WITH THIS ASSERTION, SETS FORTH THE FOLLOWING FACTS AND LAW DEMONSTRATING AND MAKING THE REQUISITE SHOWING THAT HIS CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED!!!

--- AND HERE AGAIN, PETITIONER SPECIFICALLY REQUESTS THE NINTH CIRCUIT COURT TO TAKE JUDICIAL NOTICE OF THE ENTIRE CASE FILE, --- FROM THE LOWER COURTS ON FILE [See 9TH CIR DOCKET ITEM NO. 2] --- AND TO TREAT THOSE PLEADINGS -- RECORDS -- AND DOCUMENTS AS IF THOUGH FULLY SET FORTH IN THIS INSTANT PETITION FOR CERTIFICATE OF APPEALABILITY HEREIN -- AND ESPECIALLY THE POINTS AND AUTHORITIES AND MEMORANDUM'S OF LAW FILED BY THE RESPECTIVE PARTIES BELOW ??!!

5.) THE IMPROPER USE OF GANG ENHANCEMENT CHARGE and "GANG" EXPERT witnesses testimony operated to violate PETITIONER'S CONSTITUTIONAL RIGHT to DUE PROCESS OF LAW and a FAIR TRIAL UNDER THE SIXTH and FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

PETITIONER MAINTAINS that the only PURPOSE THE GANG CHARGE SERVED WAS TO PREJUDICE and CONTAMINATE HIS JURY and DENY HIM A FAIR TRIAL and DUE PROCESS OF LAW, -- and RENDERED HIS TRIAL "FUNDAMENTALLY UNFAIR"

FIRST OF ALL THE SOLE LEGISLATIVE PURPOSE and FUNCTION OF THE STATES GANG ENHANCEMENT STATUTE [CAL. PENAL CODE § 186.22] -- IS TO IMPOSE ADDITIONAL PUNISHMENT FOR CRIMES WHEN THEY ARE COMMITTED FOR BENEFIT OF "STREET GANG" HOWEVER THE CIRCUMSTANCES THAT ARE PRESENT IN PETITIONER'S CASE CLEARLY INDICATE that the state IS JUST SIMPLY NOT PERMITTED TO USE BOTH THE FIREARM ENHANCEMENT and THE GANG ENHANCEMENT THE CAN ONLY LEGITIMATELY USE ONE OF THOSE see CALIF PENAL CODE § 1170.1(f) and [PEOPLE V RODRIGUEZ] (2009) 47 CAL 4TH 501: see also PEN CODE § 654:

THE GANG ENHANCEMENT STATUTE COULD NOT and CANNOT BE USED TO IMPOSE ADDITIONAL PUNISHMENT -- SO THE ONLY PURPOSE IT SERVED WAS TO PREJUDICE and CONTAMINATE JURROR'S MINDS AND WAS INAPPROPRIATELY USED TO PROVE "IDENTITY" AND TO WRONGFULLY SUAX JURRORS TO BELIEVE THAT CRIMES WERE COMMITTED FOR BENEFIT OF THE GANG and THAT IT WAS SOME KIND OF GANGLAND OR GANSTER'S HIT OR EXECUTION ATTEMPT

THE GANG CHARGE SHOULD NOT OF EVEN BEEN PART OF THE PETITIONER'S JURY TRIAL AT ALL !!! IN THE FIRST INSTANCE!

THE PROSECUTION INTENTIONALLY and INAPPROPRIATELY USED the GANG CHARGE and IMPROPERLY MADE IT PART OF THE TRIAL -- SO THAT JURROR'S WOULD ASSUME THAT CRIMES WERE COMMITTED FOR the STREET GANG'S and SO the DEFENDANT MUST HAVE BEEN THE PERPETRATOR --- THE PROSECUTION USED THE GANG CHARGE TO CONVINCE JURY that PETITIONER WAS THE PERPETRATOR OF THE SHOOTER WHEN THERE WAS NO DIRECT EVIDENCE that PETITIONER WAS THIS PERSON -- IN FACT EYE-WITNESS IDENTIFICATION AT THE TRIAL WAS LITERALLY NON-EXISTANT -- BOTH VICTIM and OTHER WITNESS testified at TRIAL that PETITIONER WAS NOT THE PERSON WHO FIRED the SHOTS (EMPHASIS ADDED) ----

NOTE: ---- ATTORNEY GENERAL CONCEDED ON DIRECT APPEAL that § 186.22 GANG ENHANCEMENTS CANNOT BE USED OR IMPOSED IN a CASE THAT CARRIES A LIFE TERM ??!!

---- THE PROSECUTION USED THE GANG ENHANCEMENT CHARGE and GANG EXPERTS testomony and SUBJECTIVE HEARSEY OPINIONS TO INAPPROPRIATELY and PREJUDICIALLY ESTABLISH the element of IDENTITY and attempt to HOOD-WINK THE JURY into BELIEVING That PETITIONER WAS THE SHOOTER OR PERPETRATOR

-- IN SHORT -- THE GANG enhancement WAS USED TO PROVE THE THE element of "IDENTITY" WHEN THERE EXISTED NO eye WITNESS IDENTIFICATION OR other PROBATIVE EVIDENCE ON ISSUE --other Then some PURPORTED PRETRIAL, extra-JUDICIAL interview CONDUCTED BY Law enforcement officer. That WAS NOT TAPED OR OTHERWISE RECORDED - totally CONTRARY TO TRAINING GUIDELINES and POLICES and PROCEDURES and That INVOLVED WITNESSES WHO DO NOT EVEN SPEAK ENGLISH WHATSMORE IS That at TRIAL these same TWO WITNESSES UNDER OATH and THROUGH an INTERPRETOR -- BOTH DENIED That said interview OR out of COURT ID EVER TOOK PLACE -- as a BARE MINIMUM HERE -- THERE JUST SIMPLY DID NOT EXIST sufficient EVIDENCE at TRIAL TO PROVE BEYOND a REASONABLE DOUBT the element of IDENTITY and UNDER [JACKSON V VIRGINIA] (1979) 443 U.S. 307. VIOLATES DUE PROCESS and COMPELS REVERSAL ???

--- and JUST for the sake of ARGUEMENT -- UNLESS THE VICTIM and SECOND WITNESS HAD PERSONAL KNOWLEDGE -- WHERE They DID IN fact PERCIEVE PETITIONER as THE SHOOTER -- THERE testomony and ID at TRIAL IS SIMPLY NOT EVEN ADMISSIBLE and NOT RELEVANT as a MATTER OF LAW [See CALIF EVIDENCE CODE § 403(C)]

TAKE AWAY THE GANG CHARGE offenses and ALL That IS left WOULD BE an EMPTY SHELL - without any VIABLE OR PROBATIVE EVIDENCE That IS RELEVANT and ADMISSIBLE that COULD OF BEEN USED OR RELIED ON TO SUFFICIENTLY PROVE ALL OF the NECESSARY elements OF the UNDERLYING offense's !!?

SIGNIFICANT ENOUGH TO POINT OUT HERE! IS That the FIRST TRIAL OF THIS MATTER RESULTED IN a HUNG JURY 7-5 FOR ACQUITTAL - BECAUSE the JURORS COULD NOT AGREE That PETITIONER WAS THE SHOOTER (EMPHASIS ")

PETITIONER MAINTAINS, -- That TO ALLOW THE GANG CHARGE and GANG EXPERTS SUBJECTIVE HEARSEY testomony That do PERTAINS TO OR RELATES TO ULTIMATE ISSUE's OF fact ON GUILT OR TO ESTABLISH NECESSARY ELEMENTS OF the UNDERLYING offense's --- VIOLATES PETITIONER's 6TH and 14TH AMENDMENT RIGHTS and INVADES THE PROVINCE OF THE JURY TO DETERMINE ALL RELEVANT FACTS, and That ARE BASED UPON ADMISSIBLE, RELEVANT EVIDENCE !!

--- AND AS PETITIONER SET FORTH ABOVE AND ARGUED OUT ON DIRECT APPEAL --- "TO ALLOW SUCH EVIDENCE DEPRIVES A DEFENDANT OF DUE PROCESS OF LAW AND HIS RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION (see GEN. SULLIVAN V LOUISIANA (1993) 508 U.S. 275; see also PEOPLE V PARTIDA (2005) 37 cal APP 4th 428 at PG 435; see (AOB PG 17) DIRECT APPEAL, state court WHERE COURT FOUND THAT DEFENDANTS OBJECTION TO GANG testomony UNDER EVIDENCE CODE § 352, --- ALLOWED HIM TO ARGUE ON APPEAL THAT ERROR VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS --- !)

--- FURTHERMORE, --- SUCH ERROR'S IMPLICATE DUE PROCESS RIGHTS aswell as SIXTH AMENDMENT [redacted] PRINCIPALS PRESERVING THE EXCLUSIVE DOMAIN OF THE TRIER OF FACT see case of CARRELLA V CALIFORNIA (1989) 491 U.S. 263 at 265;

WHERE A JURY IS NOT GIVEN AN OPPORTUNITY TO DECIDE RELEVANT FACTUAL QUESTIONS THE DEFENDANT IS DEPRIVED OF HIS RIGHT TO A JURY TRIAL [U.S V MCCLAIN] (5TH CIR 1977) 545 F.2D 988;

EVIDENCE IS UNFAIRLY PREJUDICIAL, --- IF IT WILL INDUCE THE JURY TO DECIDE THE CASE ON AN IMPROPER BASIS --- RATHER THAN ON EVIDENCE PRESENTED [U.S. V MILES] (7TH CIR 2000) 207 F.3D 988;

EVIDENCE THAT IS at least AS CONSISTANT WITH --- "INNOCENCE" AS WITH GUILT, --- IS INSUFFICIENT TO SUPPORT A GUILTY VERDICT [U.S. V BERGER] (2ND CIR 2000) 244 F.3D 107;

--- "FUNDEMENTALLY UNFAIR" ERROR'S DURRING TRIAL VIOLATED 14TH AMENDMENT [RIGGINS V NEVADA] (1992) 504 U.S. 127, --- THE PRIMARY PURPOSE OF THE "FUNDEMENTAL FAIRNESS" INQUIRY IS TO PROVIDE RESPECT ENFORCED BY LAW FOR THAT FEELING OF JUST TREATMENT WHICH HAS EVOLVED THRU THE CENTURIES OF ANGLO-AMERICAN CONSTITUTIONAL HISTORY AND CIVILIZATION [JOINT ANTI FACIST REFUGEE COMMITTEE V MCGRATH] (1951) 341 U.S 123; --- THE JUDICIAL OBLIGATION TO POLICE STATE CRIMINAL PROCEEDURE'S TO ENSURE THAT THEY ARE CONSISTANT WITH OUR MOST BASIC NOTIONS OF DECENCY AND FAIRNESS HAS SURVIVED THE SELECTIVE INCORPORATION-REVOLUTION AND EXISTS INDEPENDENT OF ANY SPECIFIC PROVISION OF THE BILL OF RIGHTS (see CHAMBERS V MISSISSIPPI (1973) 410 U.S. 284, 294-95; ALSO see BRIGEWD V SCRIBNER (9th cir 2009) 555 F.3D. 1069 at 1089 FN. #1

WHERE IF AN EXPERT EXPRESSED HIS JUDGEMENT THAT CRIMES WERE COMMITTED FOR THE BENIFIT OF THE GANG, THIS WOULD BE IMPROPER AND AMOUNT TO AN EXPERT OPINION THAT DEFENDANT WAS GUILTY ("EMPHASIS ADDED)

--- Furthermore, the Magistrates Report + Recommendation on Pg 17: Ln 10-19: asserts that the erroneous admission of Gang expert testomony is only subject to federal Habeas corpus --- if a specific constitutional Guarentee is violated --- or the error is of such magnatude that Results in a Denial of Due Process and the fundemental right to a fair trial -- (citing) Henry v Kernan (9th Cir 1999) 197 F 3D 1021, 1031;

--- additionally, the admission of evidence violates Due Process when two circumstances are met: (1) there are no "permissible" inferences the jury may Draw from the evidence; and --- (2) the evidence is of such quality as necessarily prevents a fair trial Jammal v Van De Kamp (9th Cir 1991) 926 F. 2D 918, 920;

This Petitioner herein asserts and maintains that all of these standards and prongs cited above are present in his case!!

--- [redacted]

6.) for example!? The prosecution filed a fraudulent, -- counterfeit Gang charge offense that only served to poison and taint his jury trial and --- created an illegal "impermissible inference" or presumption in jurors minds --- that Petitioner was Guilty without requiring the prosecution to prove this with evidence ---- and this reduced, -- relieved and lightened states burden to prove each and every element of the crimes beyond a reasonable doubt -- and shifted the burden of proof to the Defense --- this violates Due process of law (see In re: Winship (1970) 397 U.S 358, 364: and also Sandstrom v Montanna (1979) 442 U.S. 510

The prosecution in state court "did not" present any solid, probative, relevant or admissible evidence that sufficiently established Petitioner as the perpetrator or the shooter --- or that he even fired a gun -- no gun was in evidence -- no gun shot Residue evidence -- no ballistics -- --- no eye witness identification --- nothing whatsoever -- -- except the emotionally charged score factic evidence Relating to street Gang's --- and all this stuff about Gang's and Gang members --- poisoned the jury --- and the way that they boot strapped all of this to Petitioner --- created the impression in their minds of the jurors ;-- that Petitioner is Dangerous and has a disposition or proclivity to commit these types of violent crimes; and thus formulated ~~and~~ the opinion that he probably also committed the instant offenses aswell ?! -- these circumstances do not comport with Due Process and a -- --- fair trial !!!

7.)

PETITIONER ASSERTS AND CLAIMS THAT HIS RIGHT TO "PRESUMPTION OF INNOCENCE" WAS VIOLATED AND HE WAS DENIED A FAIR TRIAL

--- THE "PRESUMPTION OF INNOCENCE" ALTHOUGH NOT ARTICULATED IN THE CONSTITUTION --- IS A BASIC COMPONENT OF A FAIR TRIAL UNDER OUR SYSTEM OF CRIMINAL JUSTICE (See [ESTELLE V WILLIAMS] (1976) 425 U.S 501, 503; THIS PRINCIPAL HAS ARISEN IN THE PAST IN THE context OF PRISON GARB OR COURT ROOM SECURITY MEASURES --- HOWEVER THE COURTS HAVE ALSO EXTENDED AND APPLIED IT TO OTHER FACTORS THAT UNDERMINE THE FAIRNESS OF THE FACT FINDING PROCESS FOR EXAMPLE: IN [NORRIS V RISLEY] (9TH CIR 1990) 918 F.2D. 828, --- PRESUMPTION OF INNOCENCE IMPAIRED, WHERE NUMEROUS WOMEN ~~~~ WEARING "WOMEN AGAINST RAPE" BUTTONS ATTENDED TRIAL OF DEFENDANT CHARGED WITH SEXUAL ASSAULT --- OR THE CASE OF [UNITED STATES V OLVERA] (9TH CIR 1994) 30 F.3D 1195, --- COMPELLING DEFENDANT TO OTHER WORDS THE ROBBER SPOKE TO BANK TELLER --- OR TO REQUIRE A DEFENDANT TO PUT ON A SKI MASK -- WAIVE A TOY GUN AND SHOUT "GIVE ME YOUR MONEY" [ID. AT 1197]

PETITIONER HERE IN THIS INSTANT CASE ASSERTS THAT CIRCUMSTANCES -- EVENTS -- AND UNSCRUPULOUS TRIAL TACTICS THAT WERE EMPLOYED BY PROSECUTION AT HIS JURY "TRIAL --- OPERATED TO VIOLATE HIS "PRESUMPTION OF INNOCENCE" AND DENIED HIM A FAIR TRIAL AND DUE PROCESS --- FOR EXAMPLE: [INCLUDING BUT NOT LIMITED TOO] ---- FIRST OF ALL THE PROSECUTION DID NOT ESTABLISH WITH DIRECT RELIABLE EVIDENCE, -- THAT PETITIONER DID ANYTHING --- OTHER THAN THE FACT THAT HE MAY HAVE -- IN THE PAST HAD SOME TYPE OF ASSOCIATION OR INTERACTION WITH THE STREET GANG IN QUESTION - OR HAD KNOWN OR BEEN ACQUAINTED WITH A COUPLE OF THEM --- NO-ONE AT TRIAL WAS ABLE TO IDENTIFY PETITIONER AS THE PERPETRATOR --- THEY OBTAINED CONVICTIONS OF THESE UNDERLYING OFFENSES THROUGH SPECULATION --- CONJECTURE AND THE SUBJECTIVE PERSONAL BELIEFS OR OPINIONS OF FROM THE SAME PEOPLE WHO WERE ON THE OPPOSING PARTIES TEAM AND THAT WERE PROSECUTING HIM - AND WITH EXTRA JUDICIAL --- DOUBLE -- --- TRIPPLE HEARSAY STATEMENTS --- THAT CONFLICTED WITH THE TESTIMONY ACTUALLY GIVEN AT TRIAL UNDER OATH --- THE TRIAL WAS AN EMPTY SHELL WITH NO RELIABLE EVIDENCE, -- THAT WAS CONDUCTED WITH SMOKE AND MIRRORS INSTEAD OF EVIDENCE?!

8.) --- IN KEEPING WITH PETITIONER'S ASSERTION THAT HE WAS DENIED "DUE PROCESS" AND THAT HIS TRIAL WAS "FUNDEMENTALLY UNFAIR" --- PETITIONER REITERATES THAT THE PROSECUTIONS CASE REVOLVED ENTIRELY ARROUND - USEING THE SCARE TACTICS ABOUT THE CRIMINAL STREET GANGS AND BOOT-STRAPPING PETITIONER TO THEM BY PAST PRIOR ASSOCIATION OR CAUSUAL INTERACTION --- CLOTHES --- TATOO - ETC - ETC --- THEN TELLING THE JURRORS THAT SAID GANG'S PRIMARY ACTIVITIES ARE VIOLENT CRIMES -- SOME OF WHICH WERE EXACT SAME CRIMES PETITIONER WAS CHARGED WITH --- THIS IS POWERFULL STUFF TO A JURY OF REGULAR CITIZEN'S, --AND CREATES IN THE MINDS OF THE JURRORS, THAT IF PETITIONER WAS INVOLVED WITH THESE DANGEROUS VIOLENT, UNSAVORY GANG MEMBERS -- THAT HE MUST ALSO BE GUILTY OF THE INSTANT VIOLENT OFFENSE'S TO WHICH HE WAS ON TRIAL FOR!! --- WHEN NO EVIDENCE WAS PRESENTED TO PROVE EVERY ELEMENT OF THOSE OFFENSES BEYOND A REASONABLE DOUBT ---- THIS IS CONSTITUTIONALLY INVALID FOR IT UNDERMINES THE FACT FINDERS RESPONSIBILITY TO DETERMINE THE EXISTANCE OF THE ESSENTIAL ELEMENTS OF THE CRIME'S --- BEYOND A REASONABLE DOUBT --AND BASED UPON FACTS AND EVIDENCE --- AND NOT BASED ON SPECULATION & CONJECTURE AND SUBJECTIVITY OR PERSONAL BELIEFS OR OPINIONS!! AT PETITIONER'S TRIAL --- THIS AMOUNTED TO NOTHING SHORT OF "PROPENSITY EVIDENCE" AND ONLY SERVED TO PREY ON THE EMOTIONS OF THE JURY AND LEAD THEM TO MISTRUST THE DEFENDANT --- AND LEAD THEM TO BELIEVE OR ASSUME THAT HE WAS THE TYPE OF PERSON WHO WOULD COMMIT SUCH CRIME'S ?!!

THE NINTH CIRCUIT COURT OF APPEAL'S CASE OF: --- {MCKINNEY V REES} 9TH CIR 1993 993 F. 2D 1378, IS VERY SIMILAR AND CLOSELY ASSOCIATED WITH PETITIONER'S CASE: --- IN THIS CASE THE FATHER AND SON WERE FOUND AT THE SCENE [THEIR HOUSE] OF A MURDER --- THEIR BLOODY CLOTHES WERE FOUND AT DIFFERENT LOCATIONS OF SAID HOUSE -- OTHER THAN THE EXISTANCE OF THE DEAD BODY AT THE HOUSE, -- THERE WAS VIRTUALLY NO OTHER EVIDENCE AGAINST DEFENDANT -- THE PROSECUTION USED DEFENDANTS FACINATION WITH KNIVES AND HIS COLLECTION OF KNIVE'S --- AND PAINTED A PICTURE OF HIM WITH A COMMANDO LIFESTYLE AND BASICALLY CONVICTED MCKINNEY ON THE BASIS OF HIS SUSPICIOUS CHARACTER AND PREVIOUS ACTS ---

---- THE HIGH COURT stated that THIS WAS ERRONEOUS use of "PROPENSITY EVIDENCE" THAT RENDERED "MCKINNY'S" TRIAL FUNDEMENTALLY UNFAIR IN VIOLATION OF THE DUE PROCESS Clause -- and found that THIS HAD SUBSTANTIAL INJURIOUS affect OR INFLUENCE IN DETERMINING THE JURY'S VERDICT (citing) BRECHT V ABRAHAMSON 507 U.S. 619; AND Granted HABEAS CORPUS RELIEF ("EMPHASIS ADDED")

THE COURT FURTHER stated ---- IN THIS situation -- "MCKINNY'S" TRIAL WAS IMPERMISSIBLY TAINTED BY "IRRELEVANT" EVIDENCE, SUCH THAT IT IS MORE THAN REASONABLY LIKELY that THE JURY DID NOT FOLLOW THIS INSTRUCTION'S TO WEIGH ALL THE EVIDENCE CAREFULLY --- BUT INSTEAD SKIPPED CAREFUL ANALYSIS OF THE LOGICAL INFERENCES RAISED BY THE CIRCUMSTANTIAL EVIDENCE --- AND CONVICTED "MCKINNY" ON THE BASIS OF HIS SUSPICIOUS CHARACTER AND PREVIOUS acts IN VIOLATION OF OUR COMMUNITY'S STANDARD'S OF FAIR PLAY [MCKINNY II at PG 1385]

--- FURTHERMORE, THE COURT REJECTED THE CONCLUSION THAT THE ERRONEOUSLY ADMITTED CHARACTER EVIDENCE WAS NOT ONLY IRRELEVANT -- BUT JUST THE SORT OF EVIDENCE LIKELY TO HAVE A STRONG IMPACT ON THE MINDS OF THE JURORS" ----

--- AND BECAUSE OF THE LACK OF A "WEIGHTY" CASE AGAINST "MCKINNY" AND PERVASSIVENESS OF THE ERRONEOUSLY ADMITTED EVIDENCE THROUGHOUT THE TRIAL -- WE THINK IT HIGHLY PROBABLE that THE ERROR HAD A SUBSTANTIAL INJURIOUS effect AND influence UPON THE VERDICT !!! [MCKINNY supra at PG 1386]

--- IT IS PART OF OUR COMMUNITY'S SENSE OF FAIR PLAY that PEOPLE ARE CONVICTED BECAUSE OF WHAT THEY HAVE DONE! -- NOT WHO THEY ARE THIS RENDERED TRIAL FUNDEMENTALLY UNFAIR (FN 1)

See also case of [ALCALA V WOODFORD] (9TH CIR 2003) 334 F 3D 862 at 887! --- WHERE KNIFES IN DEFENDANTS HOME same BRAND AS MURDER WEAPON --- FOUND, IRRELEVANT ADMISSION OF IRRELEVANT EVIDENCE WAS A VIOLATION OF THE RIGHT TO FAIR TRIAL AND DUE PROCESS GUARENTEED BY FEDERAL CONSTITUTION! --- WHATSMORE IS that THE TWO CASE'S RELIED UPON BY DISTRICT COURT TO DENY PETITIONER'S HABEAS CORPUS [TAMAL V VAN DE KAMP] SUPRA 926 F. 2D 918; AND [HENRY V KERNAN] SUPRA 197 F. 3D 1021 -- ASSERTING that FEDERAL HABEAS CORPUS COURTS DO NOT REVIEW QUESTIONS OF STATE EVIDENCE LAW [See MAGISTRATES R+R PG 17] HOWEVER BOTH THESE CASE'S WERE CITED BY MCKINNY DISTINGUISHED AND FOUND INAPPLICABLE ?? MCKINNY V REES SUPRA 993 F 2D at 1384-1385. FN 11

— where court cited Henry v Estelle (9th Cir. 1993) 993 F.2d 1423; in which it also found that erroneous admission of irrelevant prior acts evidence was distinct from the situation in Estelle v McGuire 502 U.S. 62; — and a violation of Due Process that necessitated the Grant of Habeas under Brecht

The herein instant Petitioner's case also requires Reversal and Remand under these same Legal Principal's and Rationale ?!

Here in Petitioner's case, there has been a Huge "Miscarriage of Justice" — Because He is "Actually Innocent"

Furthermore, there existed numerous other witnesses on that street the Day of the Shooting, and Law enforcement never interviewed or tried to talk to any of them — and Recently Petitioner has learned that there may of been many of those witnesses who had seen what happened, — and saw a similar but different Black car from same neighborhood, that belonged to a violent street Gang, — That was not in fact this Petitioner" — and that lived in the area aswell — However the Lawyer's below in state court, did not Adequately Investigate into this — nor try. Develope such facts — and thus were never Given Due Consideration

9.) Next is that, not only was Gang Charge + Expert witness testomony used to Bolster and Inappropriately prove or Create Impermissible Inference of Identity — But that also there was Insufficient evidence at Trial to prove each and every element of the Gang Enhancement which is also a violation of Due Process of law under U.S. Constitution Jackson v Virginia supra 443 U.S. 307; Inre: Winship supra 397 U.S. 358

The Ninth Circuit has Recently Ruled on this same issue. under Identical or very similar circumstances that are present in this Petitioner's instant case see Garcia v Carey (9th Cir 2005) 395 F.3d 1099; and Briceno v Scribner (9th Cir 2009) 555 F.3d 1069; — In both these case's the court found an Un-Reasonable Application of "Jackson v Virginia" supra and Reversed and Remanded those case's ("Emphasis Added") —

---- WHATS more THAN THERE WAS GANG EVIDENCE, than Petitioner's case Herein -- for example! IN "GARCIA" supra 395 F. 3D AT 1101, - The Defendant committed a ROBBERY ON GANG TURF, AND ANNOUNCED HIMSELF TO VICTIM AS "Little Risky from El Monte Flores, HIS GANG AND WAS also with two or three OF HIS COHORTS aswell IN "BRIGENO" HIM and HIS CO-Defendants BOTH ACTIVE GANG members OF THE THRD times STREET GANG committed A SERIOUS OF MULTIPLE ROBBERIES TOGETHER, IN COSTA MESA -- GARDEN GROVE and ANAHEIM --- BOTH HAD GANG TATTOO'S ASWELL --- HELD INSUFFICIENT ??!!

FIRST, the PROSECUTOR MUST ~~[illegible]~~ Demonstrate that the Defendant committed A felony for the Benefit OF, - , AT the DIRECTION OF, OR IN ASSOCIATION with a CRIMINAL STREET GANG ------ SECOND --- the PROSECUTOR MUST SHOW that the Defendant committed the CRIME'S WITH the "SPECIFIC INTENT" TO PROMOTE, FURTHER OR ASSIST IN any CRIMINAL CONDUCT BY GANG MEMBERS.. FURTHERMORE THE COURT HAD PREVIOUSLY RECOGNIZED the IMPORTANCE OF KEEPING these TWO REQUIREMENTS separate --- and HAVE EMPHASIZED that THE SECOND STEP IS NOT satisfied BY mere membership IN a CRIMINAL STREET GANG ALONE citing {GARCIA V COREY} SUPRA 395 F.3D. 1099 at 1102-03 and N. 5; {BRIGENO V SCRIBNER} SUPRA 557 F.3D at Pg 1078: AND FOOTNOTE NO. 6 at Pg 1089: WHERE COURT EMPHASIZED that CRIMES MAY NOT BE FOUND TO BE GANG Related, Based solely upon A PERPETRATOR'S CRIMINAL HISTORY and GANG affiliation" ("EMPHASIS")

THIS IS EXACTLY WHAT HAS HAPPENED IN Petitioner's case Herein --- Because there was LITERALLY NO EVIDENCE WHATSOEVER --- EXCEPT THE GENERIC, SPECULATION and CONJECTURE AND SUBJECTIVE OPINION'S OF THE PROSECUTIONS GANG EXPERT WITNESS --- and BOTH "GARCIA" and "BRIGENO" HELD, That THIS IS WHOLLY LACKING and INSUFFICIENT --- HERE AGAIN, SOMETHING MORE than an EXPERTS WITNESSES UNSUBSTANTIATED OPINION that A CRIME WAS committed for Benefit OF, --- at the DIRECTION OF --- OR IN ASSOCIATION WITH CRIMINAL STREET GANG IS REQUIRED TO JUSTIFY a TRUE FINDING ON a GANG ENHANCEMENT

--- The Gang Experts self serving, subjective speculation and opinions --- did nothing more than improperly inform the jury how [the expert] believed the case should be decided --- without any underlying factual basis to support it see [Jaime Frank S] (2006) 141 Cal App 4th 1192 at 1197: and [People v Killebrew] (2002) 103 Cal app 4th 644 at 658: both cited with approval in Briceno supra at pg 1082: also see [People v Ochoa] (2009) 179 Cal app 4th 650 at 662:

Here in this instant case there is a total absence of any evidence that the Defendant/Petitioner intended to protect Gang turf or facilitate Gang operations and no evidence of the "specific intent" that is a mandatory prerequisite for a finding of guilt on Gang charge as the court in Briceno v Scribner supra 555 F. 3d 1069 at 1082: that the trier of fact may rely on expert testomony about Gang ~~[illegible]~~ culture and habits -- such testomony is insufficient to establish that a specific individual possessed a specific intent ("emphasis added")

--- whatsmore is ~~[illegible]~~ that as indicated earlier on (pg 6) herein -- "[t]hat an expert witness cannot express his judgement or opinion that the crimes were committed for the benefit of the Gang -- for this would of amounted to an opinion that the [Defendant] was guilty and would have been improper see Briceno" supra at pg 1089, fn. no. 1, citing Moses v Payne 543 f. 3d 1090 at 1106: and U. S. v Lockett 919 f. 2d 585 at 590

--- and this is exactly and precisely what occurred here in Petitioner Borja's case see the Respondents Pleadings or answer from District Court pg 4 ~~[illegible]~~ [3 RT at 223-24 -- and 229-33] where the Prosecutions Gang expert Detective Skahill opined that the offenses were committed for the benefit of a criminal street Gang

Skahill testified that in his opinion the present shootings was committed to promote, assist or further Hubert street Gang [3 RT 233-234] also see [2 RT 62] and [3 RT 291, -- 312-313] -- see also Petitioner's federal Habeas Corpus Points + authorities (pg 8-11;) ----

--- and as SHOULD BE ABUNDANTLY CLEAR HERE, --- IS THAT THE MAGISTRATES REPORT & RECOMMENDATIONS, WERE WRONG AND ERRONEOUSLY DECIDED --- AND ON MANY LEVELS THAT CONFLICT WITH PROVISIONS OF THE UNITED STATES CONSTITUTION

10. THE THIRD ARGUEMENT OF HIS HABEAS CORPUS --- --- PETITIONER MAINTAINS THAT THE ASSAULT WITH DEADLY WEAPON'S OFFENSE'S WERE NOT PROVEN AT TRIAL WITH SUFFICIENT EVIDENCE --- AND THAT EACH AND EVERY ELEMENT OF THOSE'S CRIME'S WERE NOT ESTABLISHED WITH RELIABLE, SOLID EVIDENCE IN VIOLATION OF JACKSON V VIRGINIA SUPRA 443 U.S. 307; AND HIS CONSTITUTIONAL RIGHTS TO FAIR TRIAL AND DUE PROCESS OF LAW WERE VIOLATED --- AND THAT HIS TRIAL WAS FUNDAMENTALLY UNFAIR !! --- PETITIONER ASSERTS THAT ALL THE LEGAL CITATIONS AND THEIR ARGUEMENTS SET FORTH IN ALLEGATION # 5 THRU 9 IN THIS HEREIN INSTANT MOTION, --- EQUALLY APPLY TO THE ADW OFFENSE AND REQUEST THAT THE COURT CONSIDER THEM AS IF THEY WERE FULLY SET FORTH IN THIS INSTANT ARGUEMENT

11. {CUMMULATIVE ERRORS}

PETITIONER CLAIMS THAT --- THE CUMULATIVE EFFECT OF THESE ERROR'S, RESULTED IN A TRIAL THAT WAS SO INFECTED WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION'S A DENIAL OF DUE PROCESS {DONNELLY V DE CHRISTOFORO (1974) 416 U.S. 637, 643: IN ANALYZING PREJUDICE IN A CASE IN WHICH IT IS QUESTIONABLE WHETHER ANY SINGLE TRIAL ERROR EXAMINED IN ISOLATION IS SUFFICIENTLY PREJUDICIAL TO WARRANT REVERSAL --- THE COURTS HAVE RECOGNIZED THE IMPORTANCE OF CONSIDERING THE CUMULATIVE EFFECT OF MULTIPLE ERROR'S --- AND NOT SIMPLY CONDUCTING AN ISSUE BY ISSUE ERROR REVIEW See {UNITED STATES V FREDERICK (9TH CIR 1996) 78 F.3D. 1370, 1381 See also {MITCHELL V WASHINGTON (9TH CIR 2000) 232 F.3D. 1197, 1212 --- NOTING THAT CUMULATIVE ERROR APPLIES ON HABEAS CORPUS REVIEW} AND {MATLOCK V ROSE (6TH CIR 1984) 731 F.2D. 1236, 1244 --- "ERROR'S THAT MIGHT NOT BE SO PREJUDICIAL AS TO AMOUNT TO A DEPRAVATION OF DUE PROCESS WHEN CONSIDERED ALONE MAY CUMULATIVELY, PRODUCE A TRIAL SETTING THAT IS "FUNDAMENTALLY UNFAIR

12.) IN THE ABUNDANCE OF CAUTION, PETITIONER RESPECTFULLY INVOKES THE PROTECTIONS OF [HAINES V KERNER] (1972) 404 U.S. 519, 520, AND ITS PROGENY, -- WHERE COURTS ARE ADVISED AND INSTRUCTED TO LIBERALLY CONSTRUE ANY PRO-SE PLEADINGS, PETITION'S OR DOCUMENTS AND TO NOT REQUIRE OF THEM -- THE SAME STRICT, STRINGENT STANDARDS THAT WOULD BE EXPECTED FROM FORMAL PAPERS DRAFTED BY [redacted] LAWYERS OR ATTORNEY'S

-- WHEN AN APPLICANT FILES HIS APPLICATION FOR {C.O.A.} IN PRO-SE -- THE COURT OF APPEALS CONSTRUE'S HIS PETITION LIBERALLY [HALL V SCOTT] (10TH CIR 2002) 292 F 3D 1264: ---- AND COURT OF APPEALS SHOULD RESOLVE ANY DOUBT ABOUT ENTITLEMENT TO {C.O.A} IN FAVOR OF GRANTING IT [SONNIER V JOHNSON] (5TH CIR 1998) 161 F. 3D 941:

---- IN KEEPING WITH THIS, -- PETITIONER MAINTAIN'S THAT HE HAS IN "FACT AND LAW" SATISFIED THE INITIAL THRESHOLD SHOWING THAT HIS CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED -- AND THAT HIS CASE DESERVES THE OPPORTUNITY TO APPEAL THE LOWER DISTRICT COURTS ERRONEOUS DECISION !!?

WHEREFORE, PETITIONER RESPECTFULLY PRAY'S THAT THE "HONORABLE" JUSTICES OF NINTH CIRCUIT FEDERAL COURT OF APPEALS, -- FIND "GOOD CAUSE" AND ISSUE THE "CERTIFICATE OF APPEALABILITY" [C.O.A.]

PURSUANT TO 28 U.S.C §1746 I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT

Dated: 1/22/13

[redacted]
JOSE ANTHONY BORJA
PETITIONER
IN PRO-SE

STATE OF CALIFORNIA COUNTY OF KERN

VERIFICATION

C.C.P. SEC. 466 & 2015.5: 28 U.S.C. SEC. 17460

I JOSE A BORJA declare under penalty of perjury that: I am the PETITIONER APPELLANT in the above entitled action. I have read the foregoing documents and know the contents thereof and the same is true of my own knowledge, except as to matters stated therein upon information, and belief, and as to those matters, I believe they are true.

Executed this 23 day of JANUARY, 2013 Kern Valley State Prison.

Signature _____
DECLARANT/PRISONER

PROOF OF SEVICE BY MAIL

C.C.P. SEC. 1013(a) & 2015.5: 28 U.S.C. SEC. 1746

I JOSE ANTHONY BORJA, am a resident of California State Prison, in the County of KERN, State of California: I am over the age of eighteen (18) years and am/am not a party of the above entitled action. My state prison address is: P.O. Box 5104, Delano, CA. 93216.

On JANUARY 23, 2013 I served the foregoing ① MOTION FOR LEAVE OF COURT TO ACCEPT LATE C.O.A, ② PETITION FOR ISSUANCE OF CERTIFICATE ~~OF WHICH CERTIFICATE~~ OF APPEALABILITY WITH EXIBITS 1+2, NOTICE OF APPEAL AND DISTRICT COURTS DENIAL OF COA. ~~FOR THE~~ ~~CLERK OF COURT, JUSTICES OF THE 9TH CIRCUIT~~.
Set forth exact title of document(s) served

On the party(s) herein by placing a true copy(s) thereof, enclosed in sealed envelope(s) with postage thereof fully paid, in the United States Mail, in a deposit box so provided at KERN Valley State Prison, Delano, CA. 93215.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. BOX 193939
SAN FRANCISCO, CA 94119-3939

OFFICE OF THE ATTORNEY GENERAL OF CALIFORNIA (LA)
DAVID ELGIN MADEO
SUITE 1702
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

List parties served

There is delivery service by United States Mail at the place so addressed, and/or there is regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 1/23/13

_____
DECLARANT/PRISONER

11 11

APPENDIX

THree

THe MAGistrates REPOET and RECOMENDATION'S From Central DISTRICTS COURTS DeNIAL OF PeTITIONER HABeas CORPUS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE ANTHONY BORJA, Petitioner, v. KELLY HARRINGTON, Warden, Respondent.	NO. CV 09-2420 DDP (SS) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Dean D. Pregerson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

On April 8, 2009, Jose Anthony Borja ("Petitioner"), a California State prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody (the "Petition") pursuant to 28

U.S.C. § 2254. Petitioner also filed a memorandum of points and authorities in support of the Petition (the "Pet. Memo"). On July 20, 2009, Respondent[1] filed an Answer to the Petition (the "Answer"), as well as a memorandum of points and authorities in support of the Answer (the "Answer Memo"). Respondent lodged numerous documents including a two-volume copy of the Clerk's Transcript ("CT") and a two-volume copy of the Reporter's Transcript ("RT") from Petitioner's trial proceedings in the Los Angeles County Superior Court. On October 6, 2009, Petitioner filed a Reply to the Answer (the "Reply"). For the reasons discussed below, it is recommended that the Petition be DENIED and that this action be DISMISSED with prejudice.

II.

PRIOR PROCEEDINGS

On June 29, 2006, a Los Angeles County Superior Court jury convicted Petitioner of attempted murder, five counts of assault with a firearm, and two counts of shooting at an occupied motor vehicle or inhabited dwelling. (CT 263-71). The jury also found true numerous sentence-enhancement allegations, including that Petitioner committed his crimes for the benefit of a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members in violation of California Penal Code section 186.22(b)(1). (CT 264-71). On August 8, 2006, the trial court, after finding that Petitioner suffered numerous serious or violent prior felony

---

[1] Kelly Harrington, warden of the Kern Valley State Prison in Delano, California, where Petitioner is incarcerated, is substituted as the proper respondent. See Fed. R. Civ. P. 25(d); Rules Governing § 2254 Cases R. 2(a).

convictions, imposed a determinate sentence of fifty-eight years and an indeterminate sentence of 175 years to life in state prison. (CT 314-25; RT 440, 448-49).

On September 26, 2007, the California Court of Appeal found that the trial court erroneously calculated Petitioner's sentence and remanded the matter for resentencing, but otherwise affirmed the trial court's judgment. (Lodgment G, Unpublished Opinion of the California Court of Appeal ("Lodgment G") at 1, 18). Petitioner subsequently filed a petition for review in the California Supreme Court, which was denied on January 3, 2008, without comment or citation to authority. (Lodgment I, California Supreme Court Order ("Lodgment I")).

Pursuant to the California Court of Appeal's remand order, on February 6, 2008, the trial court resentenced Petitioner by imposing a determinate sentence of forty-six years and an indeterminate sentence of 175 years to life in state prison. (Lodgment J, Petitioner's Abstract of Judgment and the Minute Order of February 6, 2008 ("Lodgment J")). Petitioner filed the instant Petition on April 8, 2009.

III.

FACTUAL BACKGROUND

The following facts, taken from the California Court of Appeal's unpublished decision, have not been rebutted with clear and convincing evidence and must, therefore, be presumed correct. 28 U.S.C. § 2254(e)(1).

On a Friday evening in early November 2005, Carlos Andrade gathered with some friends for a barbecue in the front yard of a home in East Valinda, an unincorporated area of Los Angeles County. As he stood in front of the house drinking a beer, he saw a black Mustang being driven recklessly up and down the residential street. Andrade yelled at the driver, whom he recognized as a neighborhood "cholo"[FN2] known as "Toro," to slow down because of the many children who live and play on the street. The driver stopped, got out of his car and engaged in a staring contest with Andrade. After a minute or so the driver got back in his car and drove away. Minutes later he returned and again got out of his car, this time brandishing a handgun. The driver pointed the gun at Andrade and fired three or four shots. Andrade turned and ran but was struck in the lower back with a bullet.

> [FN2] The responding deputy testified that Andrade, speaking in Spanish, used this term in referring to [Petitioner]. According to the deputy, "cholo" is a slang term for gangster.

Just before the shooting started, Rene Bautista, accompanied by his wife and two children, pulled into his driveway next to the yard where Andrade stood. Bautista's eleven-year-old son left the car to open the locked gate. Bautista then heard a shot coming from Andrade's direction, looked up, saw a muzzle flash and yelled for his family to

get down. One of the shots struck the driver's door of the sports utility vehicle where Bautista sat, and another struck the door to the Bautistas' garage.[FN3] As the black Mustang sped away, Bautista recognized the car as one driven by [Petitioner], who lived around the corner and was known to be a member of the local Hurley Street gang. Bautista recognized his car from an encounter with [Petitioner] several months before, when [Petitioner], driving the same black Mustang, intentionally ran over Bautista's dog. Upon questioning by a deputy sheriff who responded to the call, Andrade too identified [Petitioner] by name as the shooter.

> [FN3] Bautista testified he was about 60-70 feet from the black Mustang at the time the shooting started. Detective Steven Skahill, who investigated the crime scene, testified Bautista was approximately 35 feet from "the shooting." A streetlight is located midway between the two homes and was illuminated that night.

Based on the descriptions given by Andrade and Bautista to the responding deputies, [Petitioner] was arrested several days later; and both Andrade and Bautista identified him in a photographic lineup. After first selecting [Petitioner's] picture, however, Bautista also circled the photograph of a man who, like [Petitioner], wore a mustache. Both Andrade and Bautista identified [Petitioner's] black Mustang.

[Petitioner's] first trial ended in a hung jury. Both Andrade and Bautista were subpoenaed to testify at the retrial.[FN4] Despite their earlier statements to the responding deputies, both men now professed uncertainty about the identity of the shooter, claiming they had not actually seen the shooter's face. Under questioning, they insisted they were not afraid to testify, although two deputies testified that each had admitted out of court to being afraid of retaliation from [Petitioner] or other gang members. In light of Andrade and Bautista's recalcitrance, the responding deputies testified to their earlier statements at the scene of the shooting, and a bilingual deputy testified to Andrade's statements identifying [Petitioner] and his car at the lineup.

> [FN4] At the photographic lineup Andrade had admitted to one deputy he was afraid [Petitioner] would retaliate against him. When he later failed to appear at the preliminary hearing pursuant to subpoena, he was arrested and incarcerated for 50 days to ensure his appearance at trial. At trial Andrade claimed not to be afraid of testifying and blamed his injury and pain medication for his conflicting statements to the deputies who interviewed him. He also testified he was not aware of any gang activity in his neighborhood.

Bautista failed to appear to testify at [Petitioner's] first trial but did appear at the retrial after he was advised the court had issued a bench warrant authorizing his arrest. Although he first claimed his failure to appear was the result of a miscommunication, he later admitted he did not want to testify at trial because of his fears for his family. Bautista had earlier confided to a deputy that he had seen gang members driving past his house and staring, thus making him afraid of gang retaliation against his family.

The People also called Detective Steven Skahill, an experienced gang investigator,[FN5] to testify as an expert on gang culture and practices. Skahill testified two Hispanic gangs claimed the area of the shooting -- the Hurley Street gang and the East Side Dukes -- and identified several Hurley Street gang members who had been convicted of violent crimes. Skahill also testified [Petitioner] had claimed to be a member of the Hurley Street gang and had numerous gang tattoos, including "Hurley Street" across his chest and "SGV" (San Gabriel Valley) on his arm. Based on the circumstances of the shooting, Skahill expressed his opinion that the offenses had been committed for the benefit of a criminal street gang. According to Skahill, after the kind of "stare-down" or "mad dogging" contest that occurred between [Petitioner] and Andrade, the gang member would have to "save face" for himself and the gang to promote the gang and preserve its dominance. If a gang member had been challenged

by a member of the community and did not respond, he would be considered weak; and the gang would lose respect.

> [FN5] A 24-year veteran of the Los Angeles County Sheriff's Department, Detective Skahill had been working as a gang investigator for more than 17 years, predominantly out of the station that covers the Hurley Street gang territory.

[Petitioner] did not testify and presented only two exhibits in his defense. He was convicted on all counts, and the jury found true the special allegations supporting the gang and firearm enhancements. In a bifurcated proceeding, the court found true the allegations that [Petitioner] had suffered five prior serious or violent felony convictions within the meaning of the "Three Strikes" law ([Cal. Penal Code §§ 667(h)-(i), 1170.12(a)-(d)]) and one prior serious felony conviction under [California Penal Code] section 667, subdivision (a)(1). [Petitioner] was sentenced to an aggregate state prison term of 58 years to be followed by an indeterminate term of 175 years to life.

(Lodgment G at 2-5).

\\

\\

\\

\\

\\

IV.

PETITIONER'S CLAIMS

Petitioner raises three grounds for federal habeas relief. First, Petitioner contends that the trial court committed constitutional error by allowing a gang expert to testify regarding Petitioner's guilt. (Petition at 5). Second, Petitioner contends that there was insufficient evidence to support the gang enhancement. (Id.). Third, Petitioner contends that his conviction for committing assault with a handgun against the Bautista family was not supported by sufficient evidence. (Id. at 6).

V.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which effected amendments to the federal habeas statutes, applies to the instant Petition because Petitioner filed it after AEDPA's effective date of April 24, 1996. Lindh v. Murphy, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). "By its terms [AEDPA] bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." Harrington v. Richter, __ U.S. __, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011). Pursuant to 28 U.S.C. section 2254(d)(1) and (d)(2), a federal court may only grant habeas relief if the state court adjudication was contrary to or an unreasonable application of federal law or was based upon an unreasonable determination of the facts.

AEDPA limits the scope of clearly established federal law to the holdings of the United States Supreme Court as of the time of the state court decision under review. Lockyer v. Andrade, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). Circuit precedent is relevant under AEDPA when it illuminates whether a state court unreasonably applied a general legal standard announced by the Supreme Court. See Crater v. Galaza, 491 F.3d 1119, 1126 n.8 (9th Cir. 2007).

Here, Petitioner raised all of his claims before the California Court of Appeal on direct review. (Lodgment A, Appellant's Opening Brief ("Lodgment A") at 9-21, 26-31). Petitioner invoked the federal nature of his claim in Ground One by arguing that the gang expert's testimony "deprived [Petitioner] of due process of law, and his right to a jury trial under the Sixth and Fourteenth Amendment to the United States Constitution." (Id. at 17). Petitioner invoked the federal nature of his claim in Ground Two by arguing that "[a] conviction that is not supported by substantial evidence also violates the Fourteenth Amendment to the United States Constitution." (Id. at 11-12). Petitioner invoked the federal nature of his claim in Ground Three by arguing that "[t]he due process clause of the Fourteenth Amendment requires the reversal of a criminal conviction unless sufficient evidence was adduced at trial to justify a rational trier of fact in finding guilt beyond a reasonable doubt." (Id. at 27). The California Court of Appeal denied all of Petitioner's claims in a reasoned opinion. (Lodgment G at 5-10, 13-15).

Petitioner next raised all of his claims before the California Supreme Court in his petition for review.[2] The California Supreme Court denied Petitioner's petition for review without comment or citation to authority. (Lodgment I). The Ninth Circuit has held that the California Supreme Court's silent denial of a petition for review satisfies the exhaustion requirement. See Williams v. Cavazos, 646 F.3d 626, 637 n.5 (9th Cir. 2011). However, the Ninth Circuit explained that the silent denial of a petition for review is "not a decision on the merits" and that federal habeas courts must "look through" the silent denial to the last reasoned state court decision. Id. at 635. The last reasoned state court decision here is the opinion of the California Court of Appeal.

The California Court of Appeal denied Ground One on the merits, but expressly declined to consider Petitioner's claim under the federal Constitution "because he failed to raise that issue at trial." (Lodgment G at 9 n.10). Thus, the Court concludes that the California Court of Appeal did not "adjudicate on the merits" Petitioner's constitutional claim in Ground One. Accordingly, AEDPA deference does not apply and the Court will apply de novo review to Ground One. See Williams, 646 F.3d at 637.[3]

---

[2] Petitioner's petition for review is missing from the state court records lodged with the Court. However, the parties appear to agree that Petitioner raised all of his claims in his petition for review. Petitioner identifies the claims raised in his petition for review in the instant Petition. (See Petition at 3). Respondent specifically acknowledges Petitioner's petition for review, (Answer Memo at 2), and states that all of Petitioner's claims are exhausted, (Answer at 1), which necessarily means that he raised them in his petition for review.

[3] The Court may only consider new evidence obtained through an (continued...)

Because the court of appeal imposed a procedural default on Ground One, the adequate and independent state ground doctrine could potentially bar federal review of this claim. See, e.g., Walker v. Martin, __ U.S. __, 131 S. Ct. 1120, 1127, 179 L. Ed. 2d 62 (2011) ("[A]bsent showings of 'cause' and 'prejudice,' federal habeas relief will be unavailable when (1) a state court has declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds." (internal quotation marks, citation, and brackets omitted)). However, this Court has the discretion to deny claims on the merits without reaching procedural default issues where the outcome will be the same. See Lambrix v. Singletary, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) (holding that a district court may address the merits without reaching procedural issues where the interests of judicial economy are best served by doing so). The Court exercises its discretion to deny Ground One on the merits, under de novo review.

The California Court of Appeal denied Grounds Two and Three on the merits and addressed the federal nature of Petitioner's claims by analyzing "whether, on the entire record viewed in the light most favorable to the People, any rational trier of fact could find [Petitioner] guilty beyond a reasonable doubt." (Lodgment G at 6); (see

---

[3] (...continued)
evidentiary hearing if Petitioner satisfies 28 U.S.C. section 2254(e)(2). See Cullen v. Pinholster, ___ U.S. ___, 131 S. Ct. 1388, 1401, 179 L. Ed. 2d 557 (2011). The Court finds that there is no need for an evidentiary hearing to resolve this claim.

also id. at 15) (concluding that "the jury reasonably could have found that [Petitioner] harbored the necessary intent to assault the members of the Bautista family."). This is the same sufficiency of the evidence standard required by the federal Constitution. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Thus, the Court concludes that the California Court of Appeal "adjudicated on the merits" Petitioner's claims in Grounds Two and Three. Accordingly, the deferential standard of review contained in section 2254(d)(1) and (d)(2) applies. See Richter, 131 S. Ct. at 784.[4]

VI.

DISCUSSION

A. Petitioner Is Not Entitled To Habeas Relief On His Claim That An Expert Witness Improperly Testified Regarding The Ultimate Question Of Petitioner's Guilt

In Ground One, Petitioner contends that "[i]t was prejudicial constitutional error for a gang expert to testify as to Petitioner's guilt." (Petition at 5). Specifically, Petitioner argues that the prosecution's gang expert, Detective Steven Skahill ("Detective Skahill"), improperly "testified that Petitioner was guilty of the gang enhancements. This opinion testimony violated Petitioner's Fourteenth

---

[4] The Supreme Court has held that "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petition must overcome the limitation of § 2254(d)(1) on the record that was before that state court." Pinholster, 131 S. Ct. at 1400. Thus, the Court cannot hold an evidentiary hearing on Petitioner's claims in Grounds Two or Three. Id. ("[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review.").

Amendment rights under clearly established high court precedent because it undermined the jury's responsibility to find the ultimate facts beyond a reasonable doubt." (Pet. Memo at 13). This claim fails under de novo review.

1. Factual Background

On June 28, 2006, the prosecution called Detective Skahill as a witness. (RT 172, 210). Detective Skahill worked for over seventeen years as a gang investigator for the Los Angeles County Sheriff's Department. He was assigned to the sheriff's station near the location of the shooting for approximately twenty years. (RT 209-10). According to the detective, the area surrounding the location of Andrade's shooting was claimed by the two Hispanic gangs: the Hurley Street gang and the East Side Dukes. (RT 219-20, 223). Members of the Hurley Street gang typically have self-identifying tattoos on their bodies. (RT 220). Petitioner, whom the detective believed identifies with the Hurley Street gang, has such a tattoo on his chest consisting of the word "Hurley" as well as a tattoo bearing the letters "SGV" on his arm, which stands for "San Gabriel Valley" in gang culture. (RT 224, 232). Detective Skahill previously encountered Petitioner in September 2005 while investigating an incident in which Petitioner's black Mustang was targeted in a gang-related shooting. (RT 225-27). In addition, various field identification reports filed by sheriff's deputies identified Petitioner as a Hurley Street gang member. (RT 230-33).

When asked whether he believed Andrade's shooting was committed for the benefit of a criminal street gang, Detective Skahill opined that

> If he does do something, the respect goes up. His respect goes up within the gang itself too because he did something about it, he didn't coward down. That's how it becomes a gang incident.

(RT 235).

In Detective Skahill's opinion, a gang member would lose respect in the gang if he failed to retaliate against an individual who yelled at him for driving erratically. (RT 235-36). The detective testified that fear and intimidation play prominent roles in establishing a gang's dominance within a community. (RT 237-39). In particular, fear of gangs often dissuades neighborhood residents from testifying against gang members. (RT 238-39).

2. Analysis

Under California law, expert testimony on criminal street gangs is admissible to prove the elements of the criminal street gang enhancement. See People v. Hernandez, 33 Cal. 4th 1040, 1047-48, 16 Cal. Rptr. 3d 880 (2004) ("In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs."). Additionally, "an expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth." People v. Gardeley, 14 Cal. 4th 605, 618, 59 Cal. Rptr. 2d 356 (1996) (internal quotation marks omitted).

At the outset, it must be recognized that federal habeas courts "do not review questions of state evidence law." Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991); see also Lewis v. Jeffers, 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). "[F]ailure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting habeas relief. While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated." Jammal, 926 F.2d at 919. Thus, the erroneous admission of gang expert testimony is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of due process and the fundamental right to a fair trial. See Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999). The admission of evidence violates due process only where two circumstances are met: (1) "there are no permissible inferences the jury may draw from the evidence"; and (2) the evidence is "of such quality as necessarily prevents a fair trial." Jammal, 926 F.2d at 920 (internal quotation marks omitted) (emphasis in original).

Here, Detective Skahill's discussion of gang culture did not result in a deprivation of Petitioner's right to due process or a fair trial. Testimony from Detective Skahill, an experienced gang investigator, was relevant to explain how a retaliatory act against an individual who chose to confront a gang member within gang territory could benefit a gang by furthering its reputation for ruthlessness. See United States v. Hankey, 203 F.3d 1160, 1168-69 (9th Cir. 2000) (finding that a gang expert's testimony was relevant based on his experience as a police

officer dealing with gangs and special knowledge of gang culture). The detective's opinion that Petitioner's act of shooting Andrade was "a gang-related incident" provided the jury with a context of how street gangs operate within a community and how gangs rely on fear and intimidation to reinforce their dominance in a neighborhood. (RT 233-37).

Utilizing Detective Skahill's testimony, the jury could draw a rational inference that Petitioner's decision to shoot Andrade was motivated not just by an unwarranted display of anger, but by Petitioner's desire to aid the Hurley Street gang and cement its reputation for ruthlessness. See Windham v. Merkle, 163 F.3d 1092, 1103-04 (9th Cir. 1998) (finding no error in the admission of gang expert testimony where such evidence could establish a reasonable inference that the petitioner's crimes were motivated by an intent to retaliate against a rival gang). Without the detective's testimony, the jury would have had no means to fully assess Petitioner's motivation for shooting Andrade and what Petitioner intended to accomplish by his actions. See People v. Olguin, 31 Cal. App. 4th 1355, 1369, 37 Cal. Rptr. 2d 596 (1994) ("Evidence of gang activity and affiliation is admissible where it is relevant to issues of motive and intent . . . ."); People v. Funes, 23 Cal. App. 4th 1506, 1518, 28 Cal. Rptr. 2d 758 (1994) ("Cases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent."). Because the jury could draw some permissive inferences from Detective Skahill's testimony, its admission did not render the trial proceedings fundamentally unfair.

As for Petitioner's claim that Detective Skahill improperly testified to the ultimate question of Petitioner's guilt, the record does not reflect the detective expressing such an opinion. "Although '[a] witness is not permitted to give a direct opinion about the defendant's guilt or innocence . . . . an expert may otherwise testify regarding even an ultimate issue to be resolved by the trier of fact.'" Moses v. Payne, 543 F.3d 1090, 1106 (9th Cir. 2008) (as amended). Here, Detective Skahill never directly stated that Petitioner was guilty of any specific crime or that the jury should find true the gang enhancement allegation, nor did the detective discuss his view of Petitioner's intent or mental state. Rather, the detective opined that based on his knowledge of gang culture and Petitioner's association with the Hurley Street gang, Petitioner's retaliatory act against Andrade was "gang-related." This testimony was proper. (RT 233-34).

Because the gang enhancement statute does not expressly require a jury finding that Petitioner's crime was "gang-related," see Cal. Penal Code § 186.22(b)(1) (requiring a finding that a crime was committed for the benefit of any gang with the specific intent to promote, further, or assist in any criminal conduct by gang members), Detective Skahill's opinion did not convey to the jury how it should decide the elements of the gang enhancement statute. To the extent Detective Skahill's testimony touched upon an ultimate issue, his opinion "is not objectionable [simply] because it embraces the ultimate issue to be decided by the trier of fact." Cal. Evid. Code § 805; see Fed. R. Evid. 704 (utilizing identical standard); see also Moses, 543 F.3d at 1105 (the admission of expert testimony concerning an ultimate issue to be resolved by the trial of fact does not violate the Constitution); U.S.

v. Lockett, 919 F.2d 585, 590-1 (9th Cir. 1990) (an expert may testify regarding an ultimate issue, without giving a direct opinion on guilt or innocence). Accordingly, Ground One fails under de novo review.

B. Petitioner Is Not Entitled To Habeas Relief On His Claims Regarding Insufficient Evidence

In Grounds Two and Three, Petitioner challenges the sufficiency of the evidence to support his convictions. Specifically, in Ground Two, Petitioner contends that there was insufficient evidence to support the jury's finding that his conduct was "intended to promote, further or assist the Hurley Street gang when he shot Carlos Andrade besides the conclusory and speculative assertions of Detective Skahill." (Pet. Memo at 18). In Ground Three, Petitioner contends that there was insufficient evidence to support his four convictions for assaulting each member of the Bautista family with a firearm. (Petition at 6). There is no merit to these claims.

A conviction based on insufficient evidence deprives a petitioner of the right to due process under the Fourteenth Amendment. Jackson, 443 U.S. at 317-18. On habeas review, sufficiency of the evidence claims must be assessed "'with explicit reference to the substantive elements of the criminal offense as defined by state law.'" Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir. 2004). To determine whether the evidence is sufficient to uphold a criminal conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson, 443 U.S. at 319 (emphasis in original). "If confronted by a record that supports conflicting inferences, federal habeas courts must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. A jury's credibility determinations are therefore entitled to near-total deference under Jackson." Bruce, 376 F.3d at 957 (internal quotation marks and citation omitted).

Accordingly, "the applicant is entitled to habeas corpus relief [only] if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 324. Because this case falls under AEDPA, the standard is even more deferential. Under AEDPA, the court must determine "whether the decision of the California Court of Appeal reflected an 'unreasonable application of' Jackson and Winship [In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1070, 25 L. Ed. 2d 368 (1970)] to the facts of this case." Juan H. v. Allen, 408 F.3d 1262, 1274-75 (9th Cir. 2005) (as amended).

1. Ground Two: Gang Enhancement

The California Street Terrorism Enforcement and Prevention Act ("STEP Act"), California Penal Code sections 186.20 et seq., is a statutory scheme enacted to further the "eradication of criminal activity by street gangs." Cal. Penal Code § 186.21. Pursuant to this goal, the STEP Act contains a sentence enhancement in section 186.22(b)(1) if a person is convicted of certain gang-related crimes.

As explained by the Ninth Circuit, "Section 186.22(b)(1)'s gang enhancement may only be applied if the prosecution proves the following two elements beyond a reasonable doubt: (1) that [the petitioner] committed a felony 'for the benefit of, at the direction of, or in association with any criminal street gang,' and (2) that he did so 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.'" Emery v. Clark, 643 F.3d 1210, 1214 (9th Cir. 2011) (per curiam). "[T]o prove the elements of the criminal street gang enhancement, the prosecution may . . . present expert testimony on criminal street gangs." People v. Hernandez, 33 Cal. 4th 1040, 1047-48, 16 Cal. Rptr. 3d 880 (2004).

Although the prosecution need not prove that the petitioner possessed a specific intent to "benefit" the gang, "[w]hat is required is the specific intent to promote, further, or assist in any criminal conduct by gang members." People v. Leon, 161 Cal. App. 4th 149, 163, 73 Cal. Rptr. 3d 786 (2008) (internal quotation marks omitted). To sustain a jury's gang enhancement finding, "there must have been evidence upon which a rational trier of fact could find that [the petitioner] acted with the 'specific intent to promote, further, or assist in' some type of 'criminal conduct by gang members,' which may include the crimes of conviction." Emery, 643 F.3d at 1216 (emphasis in original). According to the California Supreme Court, "the scienter requirement in section 186.22(b)(1)--i.e., 'the specific intent to promote, further, or assist in any criminal conduct by gang members'--is unambiguous and applies to any criminal conduct, without a further requirement that the conduct be 'apart from' the criminal conduct underlying the offense of conviction sought to be enhanced." People v.

Albillar, 51 Cal. 4th 47, 66, 119 Cal. Rptr. 3d 415 (2010) (emphasis in original). Thus, "'[t]here is no statutory requirement that this "criminal conduct by gang members" be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing.'" Id. (quoting People v. Vazquez, 178 Cal. App. 4th 347, 354, 100 Cal. Rptr. 3d 351 (2009)).[5]

On direct review, the California Court of Appeal concluded there was sufficient evidence to sustain the jury's gang enhancement finding. (Lodgment G at 6-8). The appellate court acknowledged that it was possible Petitioner's conduct "was intended to enhance his own personal stature within the community . . . and not for the benefit of the Hurley Street gang," but concluded the jury's finding to the contrary was not unreasonable. (Id. at 7). In the court's view, the jury could reasonably have found that Petitioner committed the crimes with the specific intent to promote, further, or assist criminal conduct by the Hurley Street gang based on evidence of Petitioner's association with the gang, Petitioner's use of a "mad-dogging" stance directed at Andrade, the fact that the shooting occurred in gang territory, and Detective Skahill's opinion that "the crimes at issue were consistent

---

[5] The Ninth Circuit previously held in Garcia v. Carey, 395 F.3d 1099 (9th Cir. 2005), and Briceno v. Scribner, 555 F.3d 1069 (9th Cir. 2009), that "section 186.22's gang enhancement can only be applied when the defendant had the specific intent to facilitate gang members' criminal activities other than the charged crime." Emery, 643 F.3d at 1215 (emphasis in original). This interpretation, however, was explicitly disapproved by the California Supreme Court in Albillar, 51 Cal. 4th at 64-66, and is no longer binding in this Circuit. Emery, 643 F.3d at 1215 (recognizing "that the California Supreme Court has overruled Briceno and Garcia's interpretation of section 186.22(b)(1)").

with a typical gang's demand for respect on its turf and goal of intimidating community members." (Id. at 7-8).

This Court agrees with the court of appeal's determination that there is sufficient evidence to support the jury's gang enhancement. First, there is ample evidence that Petitioner committed his crimes "for the benefit of" the Hurley Street gang, specifically to preserve the gang's respect in the community and to exert the gang's dominance through fear and intimidation. Cal. Penal Code § 186.22(b)(1). Andrade and Bautista identified Petitioner as a known Hurley Street gang member, and he had tattoos indicating his association with the gang. (RT 177, 185, 218, 224, 234). Andrade, who lived in an area claimed by the Hurley Street gang, told Petitioner to slow down his vehicle, but Petitioner responded by staring at Andrade in an intimidating manner, leaving the scene, and returning moments later with a gun. (RT 116-17, 219-20, 223). Petitioner then opened fire on Andrade, hitting him in the back and nearly striking the Bautista family. (RT 116-17, 138-40, 217).

According to Detective Skahill, gang members typically participate in retaliatory acts against community members who affront them in order to reinforce their respective street gang's reputation for ruthlessness and to preserve the gang's respect. (RT 233-36). Viewed in this context, Petitioner's act of shooting Andrade could reasonably be interpreted as an attempt to intimidate residents and to elevate the Hurley Street gang's status in the neighborhood, thereby conferring a benefit on the gang. See Albillar, 51 Cal. 4th at 63 ("Expert opinion that particular criminal conduct benefitted a gang by enhancing its

reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)."). While the jury could have rejected Detective Skahill's interpretation of Petitioner's conduct, it evidently found the detective's opinion believable. Because the record supports such a finding, the Court must accord deference to the jury's findings. Bruce, 376 F.3d at 957.

Second, there is also ample evidence that Petitioner committed his crimes with the specific intent to "promote, further, or assist in any criminal conduct by gang members." Cal. Penal Code § 186.22(b)(1). A reasonable jury could infer that Petitioner's retaliation against Andrade in front of neighborhood residents within the boundaries of Hurley Street gang territory was intended to promote, further, or assist the gang's criminal activities by intimidating neighborhood residents, dissuading them from reporting gang crimes to the police, and solidifying the gang's territorial control. See Vazquez, 178 Cal. App. 4th at 353-54 (finding that a murder perceived as an act of intimidation could facilitate a gang's commission of future crimes).

In challenging the sufficiency of the evidence, Petitioner relies on Garcia v. Carey, 395 F.3d 1099 (9th Cir. 2005), in arguing there was insufficient evidence of scienter, asserting that Detective Skahill's expert testimony was "purely speculative" as to the question of Petitioner's intent. (Pet. Memo at 19-20). However, the Ninth Circuit has recognized that Garcia's interpretation of the scienter requirement in California Penal Code section 186.22(b)(1) was incorrect. Emery, 643 F.3d at 1215. Thus, Petitioner's reliance on Garcia is misplaced.

Petitioner references the California Court of Appeal's observation that it was "quite plausible [his] conduct was intended to enhance his own personal stature within the community" as an indication that the jury's gang enhancement finding was unreasonable. (Pet. Memo at 20). This Court disagrees. Although it is "quite plausible" Petitioner shot Andrade for the sole purpose of enhancing his own personal stature, it is equally plausible he committed such a crime for the benefit of the Hurley Street gang. Consistent with the Jackson standard of reviewing sufficiency of the evidence claims, the Court entertains the presumption "that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Bruce, 376 F.3d at 957.

Petitioner also challenges the gang enhancement finding based on his assertion that he was not an "active" member of the Hurley Street gang. (Pet. Memo at 20-21). Regardless of Petitioner's actual status within the Hurley Street gang, "[t]he enhancement set forth in section 186.22(b)(1) . . . does not depend on membership in a gang at all. Rather, it applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." Albillar, 51 Cal. 4th at 67-68. Even assuming arguendo that Petitioner was no longer an "active" Hurley Street gang member, that fact alone would not negate a section 186.22(b)(1) gang enhancement.

Finally, Petitioner argues that his act of staring at Andrade in an intimidating way (i.e., "mad dogging") was not indicative of "a typical gang's demand for respect." (Pet. Memo at 21). Contrary to Petitioner's argument, the California Court of Appeal did not reference

Petitioner's "mad dogging" as evidence that Petitioner demanded respect for his gang. Rather, the appellate court noted his intimidating stare, coupled with his other actions, could reasonably be perceived as an attempt to frighten Andrade and to intimidate the neighborhood. (Lodgment G at 7). Thus, Petitioner's act of staring at Andrade was not the sole basis for the jury's finding that he possessed the requisite intent under California Penal Code section 186.22(b)(1).

In sum, the Court concludes that there is sufficient evidence to support the jury's gang enhancement finding. Habeas relief on Petitioner's claim in Ground Two is unwarranted. See 28 U.S.C. § 2254(d).

2. Ground Three: Assault With A Firearm

"Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison . . . ." Cal. Penal Code § 245(a)(2). An assault, in turn, is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Id. § 240. Assault, being a general intent crime, "does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." People v. Williams, 26 Cal. 4th 779, 790, 111 Cal. Rptr. 2d 114 (2001). "[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would

directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." Id. at 788.

Thus, in order to sustain a conviction for assault with a firearm, the record must show that "the defendant had actual knowledge his act, by its nature, would probably and directly result in physical force being applied on another person." People v. Riva, 112 Cal. App. 4th 981, 997, 5 Cal. Rptr. 3d 649 (2003). "Because the gravamen of assault is the likelihood that the defendant's action will result in a violent injury to another, it follows that a victim of assault is one for whom such an injury was likely." People v. Trujillo, 181 Cal. App. 4th 1344, 1355, 105 Cal. Rptr. 3d 316 (2010) (citation omitted).

On direct review, the California Court of Appeal concluded there was sufficient evidence to support Petitioner's assault convictions. The court, after stating the applicable law regarding an assailant's knowledge, held,

> A reasonable person would have realized if he fired at a person standing with friends in front of a home in a residential neighborhood early on a Friday evening, the bullet could strike other pedestrians or residents, whether or not those individuals were intended targets. The jury was presented with evidence the Bautistas' car had just driven into the driveway adjacent to the yard where Andrade stood when [Petitioner] fired, and there was no evidence

> [Petitioner] did not see the car or its individual occupants. Accordingly, the jury reasonably could have found that [Petitioner] harbored the necessary intent to assault the members of the Bautista family.

(Lodgment G at 15). As discussed below, the California Court of Appeal's rejection of Petitioner's challenge to the sufficiency of the evidence was not contrary to, or an unreasonable application of, clearly established federal law, nor did it constitute an unreasonable determination of the facts in light of the evidence presented.

In the present case, this Court concludes that, pursuant to Jackson, 443 U.S. at 319, the evidence was sufficient to support Petitioner's convictions for assaulting the Bautista family with a firearm. On the night of the incident, Petitioner pointed a gun at Andrade after Andrade yelled at him to slow down his vehicle. (RT 116-17). At that moment, Bautista, Andrade's neighbor, had just arrived home with his wife and two children and was stopped in his car in front of his driveway. (RT 135-37). Bautista noticed Andrade standing on the open sidewalk next door and greeted him, but Andrade did not respond. (RT 136, 180). When Bautista's son exited the car to open the driveway gate, Bautista heard a series of gunshots and saw muzzle flashes from a gun. (RT 137-38). Bautista alerted his son, daughter, and wife to get down, and his car and house were struck by bullets. (RT 137-38, 182). Although neither Bautista nor his family were injured, Andrade was hit by a bullet. (RT 138, 140). From these facts, a rational juror could find beyond a reasonable doubt that Petitioner (1) had the present ability to commit a violent injury on Bautista and his family, (2)

attempted to do so with a firearm, and (3) had actual knowledge that his act of firing a gun would probably and directly result in injuring anyone caught within range of his gunshots. See Trujillo, 181 Cal. App. 4th at 1351, 1357 (upholding multiple assault convictions based on the defendant's act of firing a firearm at a car despite his unawareness of a passenger in the back seat); People v. Felix, 172 Cal. App. 4th 1618, 1628-30, 92 Cal. Rptr. 3d 239 (2009) (upholding multiple assault convictions based on the defendant's actual knowledge that his act of firing at a house could endanger the people inside). Because the record supports a finding that Petitioner knew his intentional act of firing a gun would (and did, in Andrade's case) result in injury, sufficient evidence demonstrates Petitioner's intent to commit an assault on the Bautista family.

Petitioner, however, claims the prosecution was required "to prove that Petitioner was aware of the presence of the Bautistas," and he argues the California Court of Appeal improperly required him to disprove his awareness of the assault victims' presence. (Pet. Memo at 23). As illustrated above, the prosecution merely needed to prove that Petitioner had actual knowledge his actions would probably result in injury. Evidence of Petitioner's subjective awareness of the Bautista family was unnecessary to sustain his assault convictions. Trujillo, 181 Cal. App. 4th at 1357 (holding that whether a defendant who shot at a car was subjectively aware of unseen passengers was irrelevant). Moreover, the Court notes that evidence of Petitioner's awareness of the presence of the Bautistas or other people in the immediate range of his gunfire could be inferred circumstantially based on the close distance between Bautista's car and Andrade, the fact that Bautista's son was

outside the car trying to open the driveway gate, and Bautista's ability to observe muzzle flashes from Petitioner's gun. See People v. Bloom, 48 Cal. 3d 1194, 1208, 259 Cal. Rptr. 669 (1989) ("Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction."). Furthermore, the California Court of Appeal's observation that "there was no evidence [Petitioner] did not see the car or its individual occupants" did not imply Petitioner bore the burden of proving his knowledge of the Bautistas or lack thereof. (Lodgment G at 15). Rather, the court, within the context of its assessment of the sufficiency of the evidence, simply noted a deficiency in the record, i.e., the absence of evidence supporting Petitioner's claim that he was unaware of the Bautista family's presence.

In sum, the Court concludes that there is sufficient evidence to support Petitioner's conviction for assault with a firearm. Habeas relief on Petitioner's claim in Ground Three is unwarranted. See 28 U.S.C. § 2254(d).

VII.
RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Amended Report and Recommendation; and (2) directing that Judgment be entered dismissing this action with prejudice.

DATED: September 1, 2011

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

TO: THE CLERK OF THE COURT
AND THE HONORABLE JUSTICES
OF THE NINTH CIRCUIT, U.S.
COURT OF APPEALS
SAN FRANCISCO, CALIF

RE: NO. 12-56187
ENCLOSED PETITION FOR
REHEARING (EN-BANC)

TO WHOM IT MAY CONCERN,

BELIEVE ME, I DO REALIZE THAT YOU FOLKS ARE VERY BUSY PEOPLE AND THAT YOUR TIME IS VALUEABLE -- AND THAT YOU ARE MOST LIKELEY OVER-WORKED AND UNDER-PAID!! --- BUT IF I MAY BEG FOR YOUR INDULGENCE HERE FOR ONE MINUTE?!! AND ASK THAT THE COURT CLERK'S AND THE "JUSTICES" THEMSELVES ACKNOWLEGE THAT PETITIONER IS NOT AN "ATTORNEY" AND TO NOT REQUIRE OF HIM THE SAME FORMAL, STRICT, STRINGENT STANDARD'S AND PROCEEDURE'S THAT WOULD BE EXPECTED FROM AN LAWYER --- AND TO LIBERALLY CONSTRUE HIS LEGAL PLEADINGS (SEE CASE OF [HAINES V KERNER] (1972) 404 U.S. 519 AT 520 -- AND COURT'S ARE ADVISED TO DO SO, DESPITE FAILURE TO CITE PROPER LEGAL AUTHORITY---- CONFUSION OF LEGAL THEORIES ---- POOR SYNTAX, AND SENTENCE CONSTRUCTION ------ OR LITIGANTS UN-FAMILIARITY WITH PLEADING REQUIREMENTS [U.S. V SEESING (9TH CIR 2000) 234 F 3D. 456; [BOGG V MC DOUGAL] (1982) 454 U.S. 364; AND [MCCORMICK V CITY OF CHICAGO] (7TH CIR 2000) 230 F. 3D. 319;

THE PANEL DECISION DENYING PETITIONER'S REQUEST FOR [C.O.A.] WAS DATED: 6-19-2013, PETITIONER SUBMITTED A TIMELY MOTION FOR EXTENTION OF TIME TO FILE FOR HIS "REHEARING" UNTIL AUG 1ST 2013, --- THUS THE ENCLOSED PETITIONER FOR "REHEARING" (EN-BANC) SHOULD BE RECIEVED AS TIMELY!! -----

--- FURTHERMORE PRISON OFFICIALS AND LAW LIBRARIAN AT THIS PRISON HAVE "FLAT OUT" REFUSED TO MAKE THE REQUIRED ---

--- And Necessary Amount of copies for the FULL (EN-BANC) consideration and vote this would ask if the federal court and/or Clerks thereof (assist) to BRIDge this shortcomming --for the PRISON officials oppressive conduct's actions are out of petitioner's control or influence!! I had to fight with them to even get the minimal amount of copies to file and to serve the parties--- so could you please! make the copies and/or electronically transmitt this petition to ALL JUSTICES of the FULL COURT ??!! ,--- I'd Be most Grateful and Greatly Apreciate it!! "thank you" ☺

Finally, I do not have access to a type writter--so I had to handwrite the enclosed petition,--this as such I went a little over the 15 page Limit!? --- if it had been typed, it would not of even been 15 pg's -- so please!! excuse this aswell

Thanking you in advance for your consideration, --time and attention!!!!

Sincerely

Respectfully

Dated: 7/24/13

X _____

Jose Anthony BORJA

Petitioner in PRO-se

(2)